

(22,452.)

(22,452.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 831.

TEXAS AND NEW ORLEANS RAILROAD COMPANY AND
LOUISIANA WESTERN RAILROAD COMPANY AND
THEIR SURETY, THE UNITED STATES FIDELITY &
GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

FANNIE MILLER, G. W. MILLER, WILLIAM D. MILLER,
DORRACE H. MILLER, AND FANNIE MILLER, SUING
AS NEXT FRIEND, &c.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

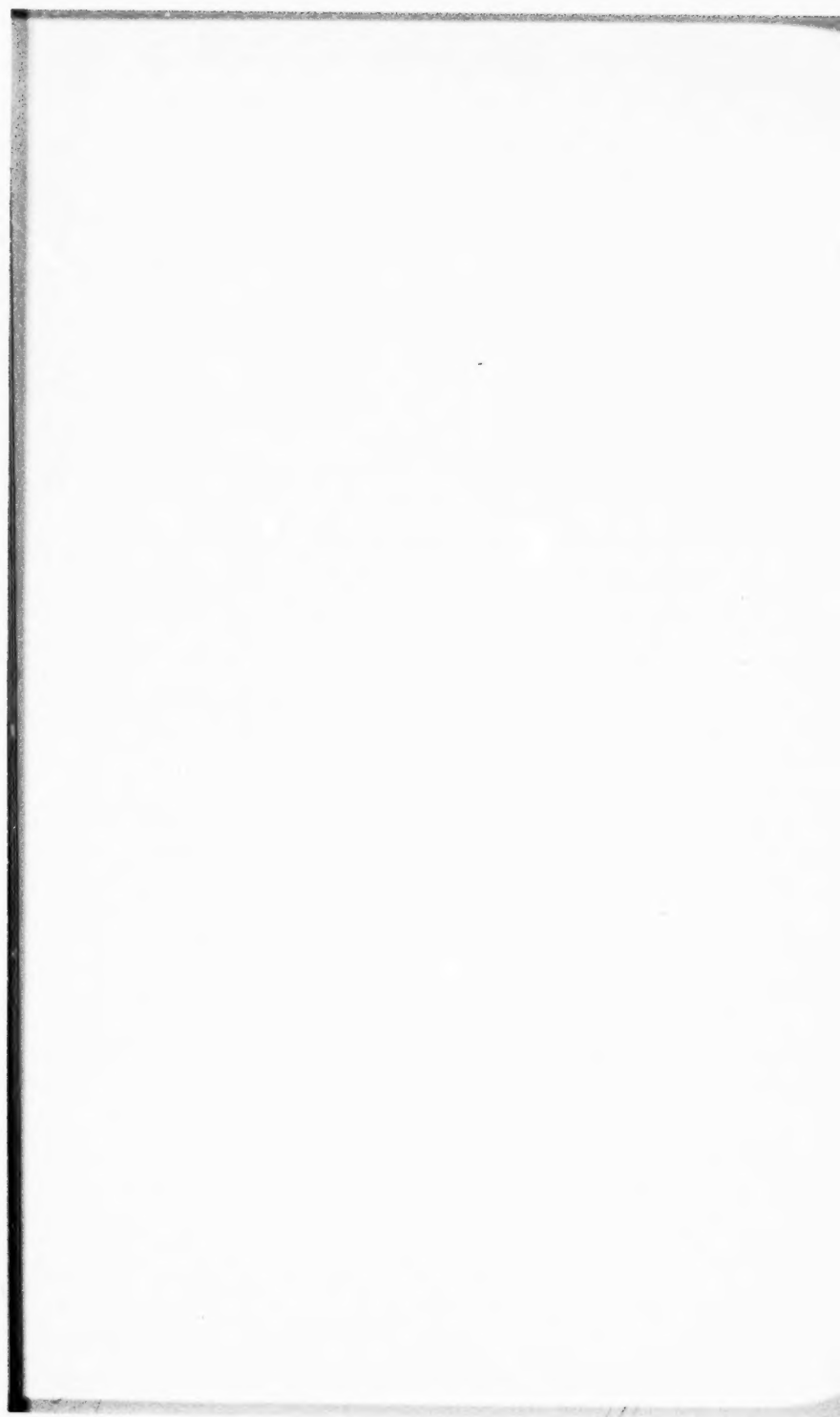
| | Original. | Print |
|--|-----------|-------|
| Transcript from district court of Harris county, Texas..... | 1 | 1 |
| Caption | 1 | 1 |
| Plaintiffs' first amended original petition..... | 1 | 1 |
| Original answer of defendant Louisiana Western Ry. Co..... | 8 | 6 |
| First amended answer of defendant Texas and New Orleans R. R. Co..... | 20 | 14 |
| Supplemental answer of defendant Louisiana Western Ry. Co.. | 23 | 16 |
| Supplemental answer of defendant T. & N. O. R. R. Co..... | 27 | 19 |
| Order overruling plea in abatement and to the jurisdiction and general and special demurrers of defendants..... | 31 | 22 |
| Judgment | 33 | 23 |
| Conclusions of fact and law..... | 34 | 24 |

| | Original. | Print |
|--|-----------|-------|
| Defendants' bill of exceptions No. 1 | 38 | 27 |
| Plea to jurisdiction and in abatement | 38 | 27 |
| Deposition of Henry P. Dart | 43 | 30 |
| Offer of act No. 21 of 1878 of Louisiana | 70 | 48 |
| Offer of State constitution of 1868 of Louisiana | 72 | 49 |
| Offer of article 2315, Revised Code of Louisiana | 72 | 49 |
| Offer of reported decisions, Louisiana | 72 | 49 |
| Offer of adjudicated cases, &c. | 73 | 50 |
| Agreements of counsel | 74 | 50 |
| Judge's certificate to bill of exceptions | 75 | 51 |
| Defendants' bill of exceptions No. 2 | 75 | 51 |
| Rule No. 334, T. & N. O. R. R. Co. | 75 | 51 |
| Judge's certificate to bill of exceptions | 76 | 52 |
| Defendants' bill of exceptions No. 3 | 76 | 52 |
| Rule No. 420, Morgan's L. & T. R. R. Co., &c. | 77 | 53 |
| Judge's certificate to bill of exceptions | 77 | 53 |
| Defendants' bill of exceptions No. 4 | 78 | 53 |
| Offer of testimony of Felix and Theresa Gross | 78 | 53 |
| Judge's certificate to bill of exceptions | 78 | 53 |
| Defendants' bill of exceptions No. 5 | 78 | 54 |
| Interrogatories to Henry P. Dart, &c. | 79 | 54 |
| Judge's certificate to bill of exceptions | 80 | 55 |
| Defendants' bill of exceptions No. 6 | 81 | 56 |
| Interrogatories to Henry P. Dart, &c. | 81 | 56 |
| Judge's certificate to bill of exceptions | 86 | 59 |
| Defendants' bill of exceptions No. 7 | 86 | 59 |
| Interrogatories to Henry P. Dart, &c. | 87 | 59 |
| Judge's certificate to bill of exceptions | 89 | 61 |
| Defendants' bill of exceptions No. 8 | 89 | 61 |
| Exceptions and findings | 89 | 61 |
| Judge's certificate to bill of exceptions | 90 | 62 |
| Appeal bond | 90 | 62 |
| Assignment of errors | 92 | 63 |
| Cost bill of district clerk | 103 | 71 |
| Certificate of district clerk | 104 | 72 |
| Statement of facts | 105 | 73 |
| Testimony of William Reese | 105 | 73 |
| John B. Long | 114 | 78 |
| Mrs. Fannie L. Miller | 117 | 80 |
| Checks offered by defendants | 119 | 81 |
| Indemnity bond | 122 | 83 |
| Testimony of T. E. Cardinell | 123 | 84 |
| Rules 334 and 420 | 126 | 86 |
| Testimony of Felix and Theresa Gross | 127 | 87 |
| Checks offered by defendants | 128 | 87 |
| Indemnity bond | 130 | 88 |
| Plaintiffs rest | 131 | 89 |
| Testimony of J. A. Sober | 131 | 89 |
| Exhibit A—Plat | 137 | 92 |
| B—Notice | 138 | 93 |
| Testimony of C. C. Mallard | 138 | 93 |
| E. E. Shackford | 144 | 97 |
| Harvey Hildebrand | 156 | 105 |

INDEX.

III

| | Original. | Print |
|---|-----------|-------|
| Testimony of W. H. Kimmer..... | 158 | 106 |
| G. E. Bustin..... | 161 | 108 |
| L. Lawlor..... | 167 | 112 |
| Frank P. Davis..... | 170 | 114 |
| W. S. Cox..... | 174 | 117 |
| G. R. Cottingham..... | 183 | 123 |
| Rules Nos. 343 and 371..... | 193 | 129 |
| Original petition, Miller case..... | 193 | 129 |
| Testimony of Henry P. Dart..... | 199 | 133 |
| Act No. 21, Louisiana, March 30, 1878, section 17..... | 205 | 137 |
| Decisions in support of immunity provisions of charter.... | 206 | 138 |
| Original petition, Gross case..... | 207 | 139 |
| Defendants rest..... | 211 | 141 |
| Testimony of Henry P. Dart..... | 211 | 141 |
| Agreement as to various decisions..... | 217 | 145 |
| Agreement as to statement of facts..... | 218 | 146 |
| Judge's certificate to statement of facts..... | 219 | 146 |
| Order of Galveston court transferring cause..... | 219 | 147 |
| Opinion of court of civil appeals..... | 221 | 148 |
| Judgment of court of civil appeals..... | 242 | 162 |
| Appellants' motion for rehearing..... | 242 | 162 |
| Order overruling motion for rehearing..... | 262 | 176 |
| Petition for writ of error in supreme court of Texas..... | 262 | 176 |
| Judgment of supreme court of Texas..... | 370 | 249 |
| Petition for writ of error in Supreme Court of United States..... | 371 | 250 |
| Writ of error bond..... | 376 | 253 |
| Certificate of lodgment..... | 379 | 255 |
| Writ of error..... | 380 | 255 |
| Citation and service..... | 382 | 257 |
| Assignment of errors..... | 383 | 258 |
| Cost bill of clerk of court of civil appeals..... | 393 | 265 |
| Certificate of clerk of court of civil appeals to record..... | 395 | 266 |



1

Caption.

THE STATE OF TEXAS,
County of Harris:

At a term of the District Court begun and holden at Houston, Texas, within and for the County of Harris, before the Honorable Chas. E. Ashe, Judge of the Eleventh Judicial District Court in and for the said County on the 7th day of December, 1908, and ending on the 30th day of January, 1909, the following cause came on for trial, to-wit:

No. 37282.

FANNIE L. MILLER et al., Plaintiff,

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Defendants.

Plaintiffs' First Amended Original Petition.

Filed May 25, 1908.

In the 11th Judicial District of Harris County, Texas, April Term,
 A. D. 1908.

No. 37282.

FANNIE L. MILLER et al.

vs.

T. & N. O. R. R. Co. et al.

Comes now, plaintiffs, by their attorneys, and with leave of court first had and obtained, file this their first amended original petition in lieu of their original petition filed herein, on the — day of — A. D., 19—.

STATE OF TEXAS,
Harris County:

In the 11th Judicial District Court of Harris County, Texas, April Term.

To said Court:

Your petitioners, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, plaintiffs complaining of the
 2 Texas & New Orleans Railroad Company, defendants respectfully represents:

I.

That the plaintiffs are all residents of Harris County, Texas, and resided in said County at the time of the injury hereinafter

alleged, and the said George W. Miller, William D. Miller and Dorace H. Miller, are minors under the age of twenty one years of age, and appear herein by their next friend, the said Fannie L. Miller, who is their mother; That the said Texas & New Orleans Railroad Company is a railroad corporation duly incorporated as such under the laws of the State of Texas and operating a line of railroad in the City of Houston: Thence through a part of Harris County and other counties to a point at or near the Sabine River, and having a local agent residing in Houston, Harris County, Texas, to-wit: C. W. Sedgwick, and having also its principal office in said Harris County, Texas; that the said Louisiana Western Railway Company is a railway corporation duly incorporated under the laws of the State of Louisiana, and that it is operating a line of railroad in said State of Louisiana and thence into the State of Texas from a point on the Sabine River to the station known as Echo in said State of Texas, and having also a local agent in Harris County, Texas, to-wit: C. W. Sedgwick.

II.

That said defendant companies are now and were at the time of the occurrence hereinafter related, engaged in a joint arrangement, the terms of which are unknown to plaintiff but well known to defendants, whereby they solicited joint business and made through rates for the carriage of passengers and freight for hire over said railways and operated said railways as one continuous line between Houston, in Harris County, Texas, and La Fayette, in Louisiana, and used indiscriminately on one railway or the other, as the business or convenience required, the engines, rolling stock and employés of each other, and each hired for and discharged employés of both, and each required employés engaged by it to render service on the line of the other; that the employés operating trains on said railways were required to make and did make continuous runs from said Houston to said La Fayette, and return, and *vice versa* and that both defendants were in truth and in fact, jointly engaged as common carriers of freight and passengers for hire, between Houston and La Fayette, over both of said railways, and were partners in such business, sharing in the profits and losses thereof.

IV.

That the railway of the Louisiana Western Railway Company, ran through a country in which there were great numbers of cattle and other animals which, before the same was fenced, habitually strayed upon the right of way and track and were a great menace to the safety of trains run upon the said railway and to employés engaged in operating them, and the exercise of ordinary care on the part of defendants, for the safety of their said employés, required that they should maintain substantial fences on either side of the railway for the purpose of excluding therefrom, cattle and other animals; that there were such fences maintained by defendants and that the said fences, when defendants used ordinary care

to keep the same in reasonably safe repair and condition, and to keep the gates closed, as was their duty to do, constituted a complete barrier to all cattle and other animals, and defendants' said employes looked to defendants to use ordinary care to keep the said fences in proper repair and condition, to the end that they might not be exposed to the peril of injury or death by the derailment of the engines and cars operated by them by coming in contact with such cattle or other animals.

V.

That on, to-wit: June 1, A. D. 1905, William T. Miller, husband of the plaintiff, Fannie L. Miller, and the father of the minor plaintiffs, was in the employ of defendants in the capacity of engineer on Locomotives drawing passenger trains operated by defendants over their said railways between Houston in said Harris

4 County, Texas, and La Fayette Louisiana; and on said date he was engineer on a locomotive drawing one of defendant's passenger trains running from Houston to La Fayette over said railways; and that upon the train getting within about seven miles of the station known as Sulphur in the State of Louisiana and while running at an ordinary rate of speed the said engine struck an animal of the cow species and was thereby, together with a number of cars derailed and great quantity of steam, hot water and hot oil confined about the said engine and the tender thereof, escaped therefrom, and the said William T. Miller, was, by the said derailment, wounded and bruised and was by the said steam and water and oil scalded and burned, so that as a direct consequence of the injuries thus inflicted upon him, he thereafter in a few hours died.

VI.

That the derailment of the said engine and cars and the death of said William T. Miller were directly and proximately caused by the negligence and carelessness of defendants, their servants and agents, and employes, other than those engaged with said William T. Miller, in operating the said engine and train, in the following respects, to-wit:

First. That they permitted the said fence enclosing the right of way at and near the place where the said engine and cars were derailed to be out of repair, so that cattle could enter through the fence upon the right of way and track, and the said animal struck by the engine did enter that way. Or if the said fence was not out of repair, then a gate at or near the said place was left open and the said animal entered through the same; that defendants knew the said gate was open and allowed the same to remain open an unreasonable length of time, in consequence of which the said animal entered upon the track; or if defendants did not know the said gate was open, they and their said servants and agents charged with a duty in that regard would have known the same was open by the exercise of ordinary care in ample time to have had the same

5 closed before the said animal entered upon the said railway.

Second. That the said animal that was struck by the engine

as aforesaid, and several others of the same kind, had been on the inside of the fences enclosing the said right of way and track at and near the place where the said engine was derailed for a long time, to-wit: eight or ten hours; that defendants and their said servants and agents charged with a duty in that regard, knew of their presence within the fences long enough to have had the cattle removed therefrom or to have notified said deceased and the conductor of said train of their presence within the said enclosure and that had they been thus notified they and the fireman of said engine could and would have been on the lookout for said cattle and have avoided striking the same or any one of the same, or in any event have so regulated the speed of the train as to prevent a derailment; or if the defendants and their said servants and agents, did not have any actual knowledge of the presence of the said cattle within the right of way fences before the said engine was derailed, then they would have acquired such knowledge by the use of ordinary care, and have done it in ample time to have removed the said cattle therefrom.

Third. That the animal struck by the said engine, causing the derailment of the engine, as aforesaid, had been previously struck by another of defendants' engines from seven to ten hours before and crippled and that those of defendants' servants and employes in charge of the said engine and cars left the said animal in a wounded and disabled condition by the side of the track, and the said animal scrambled back upon the track, where it remained in its wounded condition until struck as aforesaid; and that the said animal in the condition in which it was left beside the track, would probably work its way onto the track and become a dangerous obstruction to trains running thereon, was a result that a person of ordinary prudence would have foreseen as likely to occur under the circumstances and have made provision against, and was a result the said employes, in the exercise of ordinary care, should have foreseen under the circumstances.

Fourth. That the ties supporting the rails at and near the place where the said animal was struck by said engine were old, worn and decayed, and the rails were old and worn thus rendering the track and road bed at said place in an unsafe and defective condition, so that the same were not strong enough to sustain the increased force placed upon the same as a result of the striking of the said animal and in consequence gave way, thus derailing the said engine and cars; and that the said unsafe and defective condition of the track and road bed was an efficient concurrent cause with the striking of the said animal in producing the derailment and that the said result was one that defendants should have foreseen as likely to occur under the circumstances.

Fifth. That defendants had a written or printed rule or bulletin order promulgated by and in the name of the defendant Louisiana Western Railway Company, making it the duty of all employes, without regard to the department in which they served, to report obstructions of any kind to the superintendent of the said railway and when possible to the nearest section or bridge foreman thereon.

and defined as an obstruction, anything that would interfere with the safe passage of trains at full speed, and making it the duty of such foreman to turn out promptly with all their men and remove such obstructions whenever notified by trainmen or others, and this too, even though the obstruction was not on the section of the foreman receiving the notice; that this was the method adopted by defendants to perform the obligation they were under, to their employés to furnish to them a reasonably safe track for the running of the trains they were engaged in operating; that certain employés of defendants in charge of another engine and train some seven hours before the said derailment, discovered the presence of a number of cattle, including the one struck by the said engine,

7 within the right of way fence at and near the place of the said derailment; that said employés well knew of the existence of said rule or bulletin order and knew that the cattle were an obstruction within the meaning of the said rule or bulletin order, and their duty to report them, yet, notwithstanding they wholly failed to notify the superintendent of the said Louisiana Western Railway Company, or any section foreman, which they could have done in ample time for the said cattle to have been removed and the derailment thus avoided.

Sixth. That the pilot or "cow catcher" at the front of the said engine, and which is an appliance intended for lifting and throwing animals and other objects from the track and thus preventing derailment, was constructed or adjusted to the front of the engine in such manner as that it turned up at the point and was too high above the track and as thus constructed or adjusted was an unsafe and dangerous appliance for the use for which it was intended; and that said pilot or cow catcher was further rendered an unsafe appliance for the purpose intended, in that, the iron bar attached to the top of the pilot for use in coupling onto cars, was made to lie, when not in use, upon the front of the pilot and to extend from the top at about the middle down to or beyond the point of the pilot, whereas, provision should have been made by defendants for the said bar to be drawn back toward the boiler head and there secured, which was not done; and that the said unsafe and dangerous condition of the pilot or cow catcher, when the same struck the said animal, which was lying down on the track, held the said animal upon the track instead of raising and throwing the same from the track, as would have been the case had the said pilot been properly constructed or adjusted, or the said bar had been secured back against the boiler head, and thus causing the said animal to be run upon and over by the said engine and the said engine and cars to be derailed.

That deceased was a kind and affectionate husband and father was forty-one years of age, was in good health and strength and was industrious and earned, and for a long time had earned on an average of two hundred dollars per month in his avocation of railroad engineer, and his services were reasonably worth that much; that

the greater portion of his said earnings be devoted to the maintenance and support of plaintiffs and to the education of the said minors, and he would have continued so to do so long as he lived and plaintiffs or any of them lived that he was a man of good character and habits and his counsel and advice would have been of great pecuniary value to plaintiffs, and that by reason of his death, they have been actually damaged in the sum of Thirty Thousand (\$30,000.00) Dollars.

Premises considered plaintiffs pray, that defendants each be cited according to law to answer this petition that on trial hereof they have judgment for their said damages to be apportioned among them; for costs of suit and general relief, and they will ever pray.

LOVEJOY AND PARKER,

Attorneys for Plaintiffs.

Filed May 25th, 1908, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Original Answer of Defendant La. Western Ry. Co.

Filed Ap'l 2, 1908.

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER

VS.

TEXAS & NEW ORLEANS RAILROAD CO. et al.

9 In the above entitled and numbered cause comes the Louisiana Western Railway Company, named as a defendant in the plaintiff's petition herein, for the purpose of protesting against being required to appear and answer in this behalf, for the reason that, as shown by the statement and affidavit of C. W. Sedgwick on file herein, which is hereby referred to, it has not been cited or brought before this Court by service upon any agent or officer or other person representing it, upon whom service of citation can or could be legally had for the purpose of bringing it into this Court, or requiring it to enter its appearance or plea herein, or by virtue of which a legal and valid judgment could be authorized or entered against it.

Wherefore, said defendant prays that the Court take no further cognizance of this case as against it, and that it may be discharged forthwith.

LANE, JACKSON, KELLY & WOLTERS,

Attorneys for Louisiana Western Railway Company.

II.

And in the event the Court shall have disregarded or overruled the affidavit and statement of C. W. Sedgwick, filed herein, with refer-

ence to the defect of service on this defendant, and only in such event and after excepting to such ruling and action of the Court, the said Louisiana Western Railway Company now under protest appears herein for the purpose of excepting and pleading to the jurisdiction of this Honorable Court, as follows, to-wit

Said defendant shows to the Court that, as appears on the face of plaintiff's petition herein, the cause of action, if any, the plaintiffs have, arose from acts and injuries occurring not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, — any, measured except

10 and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the Court that the laws of Louisiana, applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they will have to recover if at all, and according to which the defense to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applicable to any action accruing from a similar occurrence within the limits of the State of Texas, and that such inconsistency and dissimilarities between said laws of the two states of Louisiana & Texas are so pronounced and radical, that the Courts of this State, in the exercise of substantial justice and in comity and in accordance with the statutes and the laws of the public policies of this State cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto, and defendant avers that it is informed and believes and upon such information and belief so charges that said dissimilarities and inconsistencies, aside from many others consist, and did at the time of the injuries and since, consist of the following features and differences in particular, to-wit:

(a) That at the time that the action alleged in plaintiffs' petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of action, the parties and the remedy and the measure of damages, the laws prevailing in the State of Texas on each of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana; that said laws of Louisiana provided, authorized and entertained no joint action in favor of the wife and children and no distribution among them of the sum awarded by the verdict according to the discretion of the jury, in a suit for the death of the husband and father, as authorized by the

11 laws of the State of Texas, that said laws of Louisiana provided and entertained no action on favor of the adult children of a deceased person, arising out of his death, and limited the damages in such case to that accruing to a minor child during its minority; that the laws of the State of Louisiana, in cases in which damages were allowed to the surviving wife or minor children for injuries resulting in the death of the husband and father, included in and as part of such damages compensation for their wounded feel-

ings and affections, caused by the death of the husband and father, and for the deprivation of the pleasure and comfort of his society, while the laws of the State of Texas allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the pleasure and comfort of the society of the deceased.

(b) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of Louisiana, with reference to the doctrine of the negligence of fellow servants as a matter of defense to the Louisiana Western Railway Company, were and have remained and still are totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased's fellow servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana, when plead and proven, as this defendant proposes to do if required to plead, an available defense, and would exempt defendant from liability in this action, yet according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such defense as the negligence of a fellow servant would not avail as a bar to recovery.

(c) That the Louisiana Western Railway Company, was, and is, a corporation created by Special Act of the Legislature, known as Act. No. 21 of the Acts of the General Assembly of the State of Louisiana for the year 1878, approved March 30, 1878, and said charter and Special Act declares and provides that the company shall not be responsible for the death or personal injury of
12 any employé by an act of negligence on the part of the company, its officers or employés. The portion of said Act referred to reads substantially as follows, to-wit:

"That said company, its officers, or employees, shall not be liable in any sum whatsoever, of damages or cost, in any action brought by any party against it, or them, or any or either of them, for an injury to the person or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service upon said railroad, and upon all other railroads and transportation lines occupied and operated by said Company, at their own risk as to personal injury or loss of life or loss or detention, or, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers,

or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

That by said Act of Legislature, the assumption of risk by the deceased, Miller, as an employee, and exemption from responsibility on the part of the defendant, Louisiana Western Railway Company, for acts of alleged negligence of a fellow servants or any other servant

or employee, was largely extended beyond what it was at common law, and that this became a matter of contract between

13 the said defendant and the State of Louisiana, and a contract to which the deceased, Miller, by virtue of his employment and service became a party, and that the laws of the State of Louisiana under said charter and said contract, would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said Special Act of the Legislature above set forth were not, when enacted, nor since nor at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Courts of the State of Texas in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administer and apply said Special Act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

(d) That at the time of the occurrence in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time the laws of the State of Louisiana, and the laws and practices of the Courts of the State of Texas, were essentially different and conflicting in reference to the power and control of the trial and appellate judges over the findings and verdicts of juries, and with reference to the number of verdicts that might be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict; that while in the State of Louisiana and according to the laws and rules of practice, as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion of the judge to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the State of Texas, the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the

14 concurrence of the entire jury is essential to the finding and return of a verdict.

Wherefore, the defendant, Louisiana Western Railway Company, prays that this Court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs.

LANE, JACKSON, KELLEY & WOLTERS,

Attorneys for Defendant Louisiana

Western Railway Company.

III.

And in the event that the Court should require the defendant, Louisiana Western Railway Company to appear and defend in this

cause, and after excepting to such ruling; and in the event that the Court should overrule *siad* defendants' exceptions and pleas to the jurisdiction of this Court hereinbefore set out, and after excepting to such rulings of the Court:—then and in that event, the defendant, Louisiana Western Railway Company demurs generally to the plaintiffs' petition herein, and shows to the Court, that the matters in said petition alleged, in manner and form as therein set forth, are not sufficient at law to entitle the plaintiffs to any relief whatsoever, and of this it prays the judgment of the Court.

IV.

And for further and special demurrer herein, if need be, the said defendant, Louisiana Western Railway Company, avers that the plaintiffs' petition herein shows upon its face that the alleged acts and injuries and damages complained of, occurred not in the State of Texas, but entirely within the State of Louisiana, and accordingly the allegations of plaintiffs' petition taken altogether are not sufficient in law to constitute a cause of action, or entitle plaintiffs to the relief sought, or any relief whatsoever, and of this the said defendant prays the judgment of the Court, and that it may go hence without day.

LANE, JACKSON, KELLEY & WOLTERS,
*Attorneys for Defendant Louisiana
Western Railway Company.*

15

V.

And for plea and answer in this behalf, if need be, and after excepting to the rulings of the Court, if they should be adverse to the protest and pleas and exceptions hereinbefore set forth, the defendant, Louisiana Western Railway Company, denies all and singular the averments in plaintiffs' petition contained, and of this demanding strict proof, puts itself upon the country.

VI.

And for further plea and answer in this behalf, if need be, the defendant, Louisiana Western Railway Company avers that if it were guilty of negligence in any particular, as alleged by plaintiffs, which is not admitted but expressly denied; nevertheless, that the plaintiffs are not entitled to recover from it, for the reason that the deceased, W. Miller directly contributed to his own injury and death by his negligence in this; that while operating the locomotive with defendant's passenger train over its railway track when he knew, or by the exercise of ordinary care would have known, that stock were or were liable to be on or near said track, he ran said locomotive and train at an excessive and rapid rate of speed and took no precaution to look out for animals or other obstructions on or near said track, and took no steps to stop or check the speed of said train, and thereby to avoid the accident and injury and deceased thus contributed to his injury; and death by his own negligence.

Wherefore, said defendant avers that the plaintiffs are not entitled to recover, and for this it puts itself upon the country.

VII.

And for further plea and answer in this behalf, if need be, the defendant, Louisiana Western Railway Company avers that in so far as the deceased, W. Miller, came to his death as the result of any negligence except his own that such other negligence, if
16 any, was that of his fellow servant, the fireman, who at the time was upon the train in the locomotive with him, and who knew, or by the exercise of ordinary care would have known, that stock were on, or were likely to be on or near said track; notwithstanding which, he took no precaution to look out ahead of said train and discover such stock and to give warning thereof and avoid the accident and injury complained of.

Wherefore, the said defendant, specially pleading the law of The State of Louisiana, as it then and there existed and applied to the negligence of said fireman, avers that it is not liable to plaintiffs in this cause, and of this it puts itself upon the country.

VIII.

And said defendant avers, that it is not liable to plaintiffs in this case, for the reason that the deceased W. Miller came to his death as the result of risks and dangers that were ordinarily incident to the service that he was engaged to perform for defendant in the State of Louisiana, and as a result of risks and dangers which were open and obvious to him, and which he knew, or by the exercise of ordinary care in the performance of his duties, would and must have known that the said plaintiff had voluntarily entered the service of the said defendant as a locomotive engineer and had remained therein, with full knowledge of the manner in which its railroad tracks were closed, and with full knowledge of the existence of gates at various places in enclosures, and which were demanded and used by private land owners, and that deceased knew, or by the exercise of ordinary care in the performance of his duties must have known, that sometimes stock would pass through said gates and onto or near the track, without fault on the part of this defendant, and thus the deceased's injuries resulted from the ordinary and known risks as aforesaid, and plaintiffs are entitled to recover nothing herein, and of this said defendant puts itself upon the country.

IX.

17 And for further plea and answer in this behalf, if need be this defendant, the Louisiana Western Railway Company avers that by virtue of a Special Act of the Legislature of the State of Louisiana, known as Act No. 21 of the acts of the General Assembly of the State of Louisiana for the year 1878, approved, March 30th, 1878, which created the defendant and gave it power and existence as a corporation, it was provided that said defendant company should not be responsible for the death or personal injury of any employee while at work in its service, by any accident or alleged negligence on the part of the company, its officers or employees, and that by such legislation and by the acceptance thereof

on the part of defendant as a charter for its existence and operation, the defendant's immunity and release from liability for the death or personal injury of employees in its service became a vested right and matter of contract, and that the deceased, W. Miller by entering into the employment of said defendant and voluntarily remaining in its service in view of its corporate existence, privileges and immunities, became a party to said contract and assumed the risk of the injuries which ensued, and defendant is in no manner liable therefor to plaintiffs. Said special Act in that portion of it here plead, reads as follows: "That said Company, its officers or employees, shall not be liable in any sum whatsoever, of damages or cost, in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as

18 an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel and all such employees shall labor and render service, upon said railroad, and upon all other railroads and transportation lines occupied and operated by said company, at their own risk as to personal injury or loss of life or loss or detention, of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers, or employees and the said Company shall not be subject to any liability to any party for any such personal injury or loss of life."

And the said defendant, Louisiana Western Railway Company, here pleads said Special Act, and the acceptance thereof, and employment thereunder by deceased in bar of this action.

X.

And for further plea in bar of this action, the said defendant avers that plaintiffs should not be permitted to maintain this suit or to recover herein against this defendant, for the reason that the alleged accident and death occurred not in the State of Texas, but entirely within the State of Louisiana, and that the laws of the State of Louisiana which applied to the right of action, if any, and to the remedy and form of action and parties and measures of damages, if any, as well as to the matters of defense, are inconsistent with the laws of the State of Texas on such subjects, and especially with regard to the nature and extent of the rights of action, if any, and the remedies and the measure of damages, and with reference to the power and control of the trial and appellate judges over the findings

and verdicts of juries and the number of verdicts that might be set aside and new trial granted and the number of jurors required to concur in order to return a verdict, and with reference to the doctrine of fellow servants and the effects of negligence of fellow servants as a defense, all of which conflicts and differences are

19 more fully set forth in the plea in abatement embraced in

Section II of this answer, and with reference to the exemption of the defendant from liability by virtue of the provisions of the Special Act of the General Assembly of the State of Louisiana for the year, 1878, being entitled Act. No. 21, which is quoted in the last above paragraph No. IX of this answer; all of which matters are more particularly set forth by way of exception and plea in section II of this answer, and as therein stated are hereby referred to and made part hereof and are plead in bar of this action.

Wherefore, the said defendant avers that it would not be proper or just or practicable or according to the comity between two states of the Union for the Courts of Texas to exercise jurisdiction for the trial of this cause on its merits and attempt to render judgment against this defendant by administering the laws of the State of Louisiana.

The said defendant, having fully answered, prays that plaintiffs be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

LANE, JACKSON, KELLEY &
WOLTERS,

*Attorneys for Defendant Louisiana Western
Railway Company.*

STATE OF TEXAS,

County of Harris:

Before me, the undersigned authority, on this day personally appeared A. L. Jackson, who having been duly sworn stated upon his oath that he is one of the attorneys for the defendant Louisiana Western Railway Company, and as such is authorized to make this affidavit; that he has read over and is familiar with the allegations set up in the plea to the jurisdiction and in abatement, as contained in section II on pages 1 to 4½ of the above and foregoing answer, and that the allegations of fact therein set forth are true within the knowledge of affiants, except in so far as they are

20 expressly stated therein upon information and belief, and that in so far as they are stated therein upon information and belief affiant believes them to be true.

A. L. JACKSON.

Sworn to and subscribed before me this the 1st day of April, A. D. 1908.

[SEAL.]

RUTH E. ADAMSON,
Notary Public, Harris County, Texas.

Filed April 2nd, 1908, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

First Amended Answer of Def't Texas & New Orleans R. R. Co.

(Filed Ap'l 6th, 1908.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Now comes the defendant, The Texas & New Orleans Railroad Company, in the above entitled and numbered cause, and with leave of the Court first had and obtained, files this its First Amended Original Answer in lieu of its original answer heretofore filed in this cause, and for amendment says:

I.

For exception and plea to the jurisdiction of this Court, said defendant adopts and urges the pleas of exception *an* and exceptions set up in Sec. II of the Original Answer of its co-defendant, The Louisiana Western Railway Company, on file herein, and wherefore this defendant prays that this Court decline to take jurisdiction of this case and that this defendant may be discharged with its costs.

II.

21 And in the event that the Court should retain jurisdiction of this cause and require this defendant to appear and plead herein, then it demurs generally to the plaintiffs' petition and avers that the allegations in said petition contained, in manner and form as set forth therein, are not sufficient at law to entitle the plaintiff to any relief whatsoever, and of this it prays the judgment of the Court.

III.

And for further and special demurrer herein, the said defendant, Texas & New Orleans Railroad Company, avers that the plaintiffs' petition herein shows upon its face that the alleged acts and injuries and damages complained of occurred not in the State of Texas, but entirely within the State of Louisiana, and accordingly the allegations in plaintiffs' petition are not sufficient in law, to constitute a cause of action to entitle plaintiffs to recover, nor to any relief whatsoever, and of this defendant prays the judgment of the Court.

IV.

And for plea and answer in this behalf, if need be, the defendant, Texas & New Orleans Railroad Company, avers that it is not guilty of the wrongs and negligence charged against it, and it denies, all

and singular, the averments in plaintiffs' petition contained, and of this puts itself upon the country.

V.

And for further plea and answer in this behalf, the said defendant, Texas & New Orleans Railroad Company, avers that the allegations in plaintiffs' petition to the effect that the Texas & New Orleans Railroad Company and the defendant, Louisiana Western Railway Company, are partners in business, or were partners in business at the time of the alleged injury and death of the deceased, W. Miller, are untrue; and this defendant here specially denies each and all of said allegations in the said petition to the effect that any such partnership existed at the time of said injury and death, or subsequent thereto; and this defendant is ready to verify.

22

VI.

And for further plea and answer in this behalf, the defendant, Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, as fully set forth and contained in Sec. VI. of the original Answer of its said co-defendant on file herein.

VII.

And for further plea and answer in this behalf the defendant, Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, as the same is set forth and contained in Sec. VII of the Original Answer of its said co-defendant, on file herein.

VIII.

And for further plea and answer in this behalf, the defendant, Texas & New Orleans Railroad Company hereby adopts and urges the answer and plea of its co-defendant, Louisiana Western Railway Company, which is set forth and contained in Sec. VIII of the Original Answer of its said co-defendant, which is on file herein.

IX.

And for further plea and answer in this behalf, the defendant Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, which is set forth and contained in Sec. IX of the Original Answer of its said co-defendant, which is on file herein.

X.

And for further plea and answer, the defendant, Texas and New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, The Louisiana Western Railway Company, which is set forth and contained in Sec. X. of the Original Answer of the said co-defendant, which is on file herein.

23 Wherefore, this defendant having fully answered prays that plaintiffs be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

LANE, JACKSON, KELLEY &
WOLTERS,

*Attorneys for Defendant Texas & New
Orleans Railroad Company.*

THE STATE OF TEXAS,
County of Harris:

Before the undersigned authority, on this day, personally appeared W. G. Van Vleck, who, after being duly sworn, deposes and says that he is Vice President of and Manager for the Texas & New Orleans Railroad Company, and that of his own knowledge the allegations contained in paragraph or Section V of the above and foregoing answer, denying the existence of a partnership relation between the Louisiana Western Railway Company and the Texas & New Orleans Railroad Company, are true.

W. G. VAN VLECK.

Sworn to and subscribed before me, on this the 3rd day of April, A. D. 1908.

[SEAL.]

JNO. H. McCLUNG,
Notary Public, Harris County, Texas.

Filed April 6th, 1908. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Supplemental Answer of Deft La. Western Ry. Co.

(Filed Oct. 23, 1908.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

VS.

TEXAS & NEW ORLEANS RAILROAD CO. et al.

In the above entitled and numbered cause comes now the defendant, Louisiana Western Railway Company, and with leave of the Court first had and obtained, files this its first supplemental
24 answer, in special response to some of the new allegations set forth in plaintiffs' First Amended Original Petition filed herein May 25th, 1908, the pleading hereinafter set forth being embraced in this form and styled a supplemental answer and being made a part of this defendant's original heretofore filed in this cause by and with the consent of the plaintiffs' counsel, and reiterating all the matters of abatement, demurrer, plea and answer in

detail, as set forth in this defendant's original answer heretofore filed in this cause; and renewing and applying the same to the plaintiffs' first amended original petition, this defendant further, in response to the allegations of said petition, interposes the following pleas to-wit:

I.

For further special plea and answer in this behalf and in bar of plaintiffs' action herein, as set forth in their said first amended original petition, the defendant avers that the accident and injury and the death of William T. Miller, occurred, as alleged and set forth in plaintiffs' petition, on or about June 1st, 1905, in the State of Louisiana, that the plaintiffs have filed herein their first amended original petition May 25th, 1908, in which they make the following several allegations for the first time in this cause, to-wit:

(1) That in Section VI, sub-division First of said amended petition the plaintiffs set forth, for the first time, the following allegation, at the conclusion of said paragraph: "Or if defendants did not know the said gate was open, they and their said servants and agents charged with the duty in that regard, would have known the same was open by the exercise of ordinary care in ample time to have had the same closed before the said animal entered upon the said railway."

(2) That in sub-division second of said Section VI of the said amended petition, the plaintiffs, for the first time, set forth the following allegation: "Or if defendants and their said servants
25 and agents did not have actual knowledge of the presence of the said cattle within the right of way fences before the said engine was derailed, then they would have acquired such knowledge by the use of ordinary care, and have done it in ample time to have removed the said cattle therefrom."

(3) That in sub-division Third of Section VI. of said amended petition, the plaintiffs set forth, for the first time therein, the following allegations: "That the animal struck by said engine, causing the derailment of the engine as aforesaid, had been previously struck by another of defendant's engines from seven to ten hours before and crippled, and that those of defendants' servants and employes of the said engine and cars left the animal in a wounded and disabled condition by the side of the track, and the said animal scrambled back upon the track, where it remained in its wounded condition until struck as aforesaid; and that the said animal in the condition in which it was left beside the track, would probably work its way onto the track and become a dangerous obstruction to trains running thereon, was a result that a person of ordinary prudence would have foreseen as likely to occur under the circumstances and have made provision against, and was a result the said employes, in the exercise of ordinary care, should have foreseen under the circumstances."

(4) And that under Sub-division Fifth of Section VI of said amended petition, the plaintiffs set forth, for the first time in this cause, the following allegations: "That certain employes of defend-

ants in charge of another engine and train some seven hours before the said derailment, discovered the presence of a number of cattle, including the one struck by the said engine, within the right of way fences at and near the place of the said derailment; that said employés well knew of the existence of said rule or bulletin order and knew that the cattle were an obstruction within the meaning of the said rule or bulletin order, and their duty to report them, yet notwithstanding they wholly failed to notify the superintendent of the said Louisiana Western Railway Company, or any section foreman, which they could have done in ample time for the said cattle to have been removed and the derailment thus avoided. Or if the said rule did not apply as alleged by plaintiffs, then defendant, had no rule or resolution defining the duty of its employés with respect to cattle that should enter through the right of way fence upon the right of way and upon the track, whereas the reasonable safety of its train employés required that it should have and enforce rules or regulations for the protection of its employés in its train service against risks of injury arising from collision of its trains with cattle or other animals upon its right of way and track, under such circumstances, by casting upon certain employé the duty of removing such animals from the track and right of way, and of giving notice of their presence thereon to employés in its train service who might be exposed to danger of injury thereby, and defendant is notified to produce on the trial of this cause its written and printed rules to the end that it may be made to appear that defendant had no such rule or regulation in force at the time of the death of said Miller."

And this defendant avers that said allegations and each of them above set forth and quoted, and the rights and cause of action against this defendant shown thereby, are thus made a basis for suit and action and the facts therein alleged are sued upon for the first time by and through the said first amended original petition filed herein on May 25th, 1908, as aforesaid, the plaintiffs thereby having commenced suit and action thereon more than two years after the occurrence of the alleged accident, injury and death, to-wit, on or about June 1st, 1905, and after the accrual of the right or rights of action (if any) to plaintiffs, based on the facts and occurrences so alleged; and against each and all of said allegations and paragraphs and causes of action above quoted, and against the rights and causes of action (if any) thereby asserted, this defendant here now specifically pleads the statute of limitation of two years of the State of Texas, as a perpetual bar thereto; and in this connection specially pleads the laws and statutes of the State of Louisiana, on the subject of limitation and prescription, under and by virtue of which this defendant alleges that such rights and causes of action (if any) are barred within the period of one year from the date of their accrual; and of this defendant, puts itself upon the country.

And now having fully answered, this defendant prays as in its original answer heretofore filed in this cause, that plaintiff- be ad-

judged to take nothing by this suit, and that it may go hence and recover its costs.

LANE, JACKSON, KELLEY &
WOLTERS,
*Attorneys for Defendant Louisiana Western
Railway Company.*

Filed October 23rd, 1908, Henry Albrecht, Clerk District Court,
Harris County, Texas, by Frank H. Meyer, Deputy.

Supplemental Answer of Def't T. & N. O. R. R. Co.

(Filed Oct. 23, 1908.)

In the District Court of Harris County, Texas, 11th Judicial
District.

No. 37282.

FANNIE L. MILLER et al.

VS.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

In the above entitled and numbered cause comes now the defendant, Texas & New Orleans Railroad Company, and with leave of Court first had and obtained, files this its first supplemental answer, in special response to some of the new allegations set forth in plaintiffs' First Amended Original Petition filed herein May 25th, 1908, the pleading hereinafter set forth being embraced in this form and styled a supplemental answer and being made a part of this
28 defendant's First Amended Original Answer heretofore filed in this cause by and with the consent of the plaintiffs' counsel, and reiterating all the matters of abatement, demurrer, plea and answer, in detail, as set forth in this defendant's first amended original answer heretofore filed in this cause; and renewing and applying the same to the plaintiffs' first amended original petition, this defendant further, in response to the allegations of said petition, interpose the following pleas, to-wit:

I.

For further special plea and answer in this behalf, and in bar of plaintiffs' action herein, as set forth in their said first amended original petition, the defendant avers that the accident and injury and the death of William T. Miller occurred, as alleged and set forth in plaintiffs' petition, on or about June 1st, 1905, in the State of Louisiana; that the plaintiffs have filed herein their first amended original petition May 25th, 1908, in which they make the following several allegations for the first time in this cause, to-wit:

(1) That in Section VI. sub-division First of said amended petition the plaintiffs set forth for the first time, the following allegation,

at the conclusion of said paragraph: "Or if defendants did not know the said gate was open they and their said servants and agents charged with the duty in that regard, would have known the same was open by the exercise of ordinary care, in ample time to have had the same closed before the said animal entered upon the said railway."

(2) That in sub-division Second of said Section VI. of the said amended petition, the plaintiffs, for the first time, set forth the following allegation: "Or, if defendants and their said servants and agents, did not have actual knowledge of the presence of the said cattle within the right of way fences before the said engine was derailed, then they would have acquired such knowledge by the use of ordinary care, and have done it in ample time to have removed the said cattle therefrom."

29 (3) That in sub-division Third of Section VI. of said amended petition, the plaintiffs set forth, for the first time therein the following allegations: "That the animal struck by the said engine, causing the derailment of the engine, as aforesaid, had been previously struck by another of defendants' engines from seven to ten hours before and crippled, and that those of defendants' servants and employes in charge of the said engine and *are* left the said animal in a wounded and disabled condition by the side of the track, and the said animal scrambled back upon the track, where it remained in its wounded condition until struck as aforesaid; and that the said animal in the condition in which it was left beside the track, would probably work its way onto the track and become a dangerous obstruction to trains running thereon, was a result that a person of ordinary prudence would have foreseen as likely to occur under the circumstances and have made provision against, and was a result the said employes, in the exercise of ordinary care, should have foreseen under the circumstances."

(4) And that under sub-division Fifth of Section VI. of said amended petition, the plaintiffs set forth, for the first time in this cause, the following allegations: "That certain employes of defendants in charge of another engine and train some seven hours before the said derailment, discovered the presence of a number of cattle including the one struck by the said engine, within the right of way fences at and near the place of the said derailment; that said employes well knew of the existence of said rule or bulletin order and knew that the cattle were an obstruction within the meaning of the said rule or bulletin order; and their duty to report them, yet, notwithstanding they wholly failed to notify the superintendent of the said Louisiana Western Railway Company or any section foreman, which they could have done in ample time for the said cattle to have been removed and the derailment thus avoided. Or if the

30 said rule did not apply as alleged by plaintiffs then defendant, had no rule or regulation defining the duty of its employes with respect to cattle that should enter through the right of way fence upon the right of way and upon the track, whereas the reasonable safety of its train employes required that it should have and enforce rules or regulations for the protection of its em-

ployés in its train service against risks of injury arising from collision of its trains with cattle or other animals upon its right of way and track, under such circumstances, by casting upon certain employés the duty of removing such animals from the track and right of way, and of giving notice of their presence thereon to employés in its train service who might be exposed to danger of injury thereby, and defendant is notified to produce on the trial of this cause its written and printed rules to the end that it may be made to appear that defendant had no such rule or regulation in force at the time of the death of said Miller."

And this defendant avers that said allegations and each of them above set forth and quoted, and the rights and causes of action against this defendant shown thereby are thus made a basis for suit and action and the facts therein alleged are sued upon for the first time by and through the said first amended original petition filed herein on May 25th, 1908, as aforesaid, the plaintiffs thereby having commenced suit and action thereon more than two years after the occurrence of the alleged accident, injury and death, to-wit: on or about June 1st, 1905, and after the accrual of the right or rights of action (if any) to plaintiffs, based on the facts and occurrences so alleged; and against each and all of said allegations and paragraphs and causes of action above quoted, and against the rights and causes of action (if any) thereby asserted, this defendant here now specially pleads the statute of limitation of two years of the State of Texas, as a perpetual bar thereto; and in this connection specially pleads the laws and statutes of the State of Louisiana, on

31 the subject of limitation and prescription, under and by virtue of which this defendant alleges that such rights and causes of action (if any) are barred within the period of one year from the date of their accrual, and of this defendant puts itself upon the country.

And now having fully answered, this defendant prays, as in its first amended original answer heretofore filed in this cause, that plaintiff- be adjudged to take nothing by this suit, and that it may go hence and recover its costs.

LANE, JACKSON,
KELLEY & WOLTERS,
Attorneys for Defendant
Texas & New Orleans Railroad Company.

Filed October 23rd, 1908. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Order Overruling Plea in Abatement & to the Jurisdiction & General & Special Demurrers of Defts.

(Recorded, Vol. 18, p. 326.)

No. 37282.

FANNIE L. MILLER et al.

VS.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

On this the 30th day of January, A. D. 1909, in the above entitled and numbered cause came on to be heard the defendant Louisiana Western Railway Company's plea in abatement and to the jurisdiction of the Court, which is set forth and contained in Section II of its original answer filed in this cause April 2nd, 1908, said cause having been heretofore continued without prejudice to said plea; and said plea and the matters therein alleged having been fully read to the Court and evidence having been produced in support thereof and in connection therewith, the said plea, together with the said evidence, having been duly submitted and considered by the Court, with argument of parties, by counsel thereon, the Court finds said pleas are not well taken and the same are hereby overruled; to which ruling of the Court the said defendant, 32 Louisiana Western Railway Company, in open Court then and there excepted.

And thereupon in said case, at the same time, came on to be heard the plea to the jurisdiction and in abatement of the Defendant Texas & New Orleans Railroad Company as set forth in section I of its first amended original answer filed in this cause April 6th, 1908, and to the same effect as the aforesaid plea to the jurisdiction of the co-defendant, Louisiana Western Railway Company, and the said plea, together with evidence in support and in connection therewith, having been submitted to the Court and fully considered, is hereby overruled by the Court:—to which ruling the said defendant, Texas & New Orleans Railroad Company in open Court duly excepts.

And thereafter, on the same date, came on to be heard in their order the general demurrer of the defendant Louisiana Western Railway Company, as set forth in Section III of its said original answer, and the general demurrer of the defendant Texas & New Orleans Railroad Company set forth and embraced in Section II of its said amended original answer, and the Court having heard said demurrers and fully considered them, hereby overrules each of the said demurrers, to which rulings of the Court the said defendants, respectively, and each of them in open Court duly except.

And thereafter, upon the same date, came on to be heard the special demurrer of the defendant Louisiana Western Railway Company, which is set forth and contained in Section IV. of its said original answer, and at the same time came on to be heard the

special demurrer of the defendant Texas & New Orleans Railroad Company, set forth and embraced in Section III of its said amended original answer, and the Court, having heard and duly considered each of the said special demurrers, holds the same not well taken and overrules the same; to which ruling of the court the said defendants, and each of them respectfully except.

33 Recorded, Vol. 18, page 326, of the Minutes of the District Court of Harris County, for the 11th Judicial District of Texas.

Judgment.

(Recorded, Vol. 18, p. 327.)

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

And now on this the 30th day of January, A. D., 1909, this cause was called for trial and thereupon came the plaintiffs in person and by their attorneys, and having heretofore dismissed as to the Southern Pacific Company, all parties announced ready for trial: and the defendants' pleas in abatement and general demurrer having already been disposed *on* this day; and neither party demanding a jury the matters of fact as well as of law were submitted to the Court, and the Court having heard the pleadings, evidence and argument of counsel, is of opinion that the law is with the plaintiffs, and finds for the plaintiffs against both defendants, and assesses their damages at the sum of sixteen thousand (\$16,000.00) Dollars and apportions the same among the plaintiffs as follows:

| | |
|--------------------------|------------|
| Mrs. Fannie Miller | \$8,000.00 |
| George W. Miller | 2,000.00 |
| William D. Miller | 2,500.00 |
| Dorace H. Miller | 3,500.00 |

It is therefore considered, adjudged and ordered by the Court that the plaintiffs, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, do have and recover of the defendants, the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company the said sum of Sixteen Thousand (\$16,000.00) Dollars, apportioned among them as above stated, together with all costs incurred or expended by them in this
34 behalf, for all of which they may have their execution.

It appearing to the Court that the plaintiffs George W. Miller, William D. Miller and Dorace H. Miller, are minors without any lawful guardian of their persons or estates the amounts awarded them herein shall be paid over to the clerk of the Court to be held by him until they shall attain their majority or a guard-

ian of their estates shall be appointed and qualifies, respectively: whereupon the money shall be paid over to said minors as they become of age or to such guardian. This judgment shall bear six (6%) per cent interest per annum from date.

To the foregoing judgment and the Court's conclusions of fact and law, and every portion thereof, the defendants in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District, sitting at Galveston.

Upon application of the parties, a period of twenty days is hereby allowed from and after adjournment of the present term of this Court in which to prepare and file a statement of facts and bills of exception.

Recorded, Vol. 18, page 327, of the Minutes of the District Court of Harris County, for the 11th Judicial District of Texas.

Conclusions of Fact and Law.

(Filed Jan. 30, 1909.)

In the District Court of Harris County, Texas.

#37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

At the request of counsel for defendant the Court makes and files the following conclusions of fact and law:

35

Conclusions of Fact.

L. That the plaintiff Fannie L. Miller is the surviving wife and the plaintiffs George W. Miller, William D. Miller and Dorace H. Miller are the surviving children of William T. Miller, deceased, and the said plaintiffs and deceased at the time of his death on to-wit: June 1, A. D. 1905, were citizens of the State of Texas and resided in Harris County, in said State; that the defendants, Texas & New Orleans Railroad Company, hereinafter referred to as the "Texas Company" was on said date a railway corporation duly incorporated under the laws of the State of Texas, and owned for a long time prior thereto had owned a line of railway extending from Houston in Harris County to the State line between Texas and Louisiana; that the defendant Louisiana Western Railway Company, hereinafter referred to as the "Louisiana Company" was on said date a railway corporation duly incorporated under the laws of the State of Louisiana and owned and for a long time prior thereto had owned a line of railway extending from said State line opposite Echo, to Lafayette in the State of Louisiana, and that both said defendants on said date and for a long time prior thereto

were jointly engaged in the business of operating the said railways as one continuous line from Houston in said Harris County, Texas, to Lafayette in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employees of the other as the business or convenience required, and each hired for and discharged employees in the said joint business and the employees hired by one were required to perform and did perform services on the railway of the other; that such employees made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways as a continuous route and were partners in such business, sharing in the profits and losses thereof.

2. That the railway of the Louisiana Company ran through a country in which there were numbers of cattle and the said Company fenced its right of way for the purpose of excluding cattle therefrom and that the fences were effectual to exclude cattle from the right of way when ordinary care was used to keep them in proper repair and when such care was used to keep the gates closed; and the employees operating trains over the said railway relied upon the Company to keep the fences in repair and the gates closed to the end that they might not be exposed to the peril of injury or death by derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track.

3. That on, to-wit, June 1, A. D., 1905, the said deceased, William T. Miller, was in the employ of defendants in the capacity of engineer of locomotives drawing passenger trains operated by defendants over their said railways between Houston in said Harris County, Texas and Lafayette, Louisiana, and was on said date engineer of a locomotive drawing one of the defendants' passenger trains running from Houston to Lafayette over said railways, and that upon the train getting near a station known as Sulphur in Louisiana, in the night time, the locomotive struck an animal of the cow species and was thereby, together with a number of cars, derailed, and the said Miller then and there injured, so that as a result thereof, he died.

4. I find that some hours previous to the derailment of Miller's locomotive that another of defendants' trains had struck and killed an animal of the cow species, near the place of the derailment; and the carcass was allowed to lie upon the right of way within a short distance of a gate in the right of way fence, and that several hours prior to the derailment a number of cattle entered the right of way through the said gate and were seen by employees of defendants in charge of one of the defendants' East bound trains, gathered about the dead one holding a "ceremony" as expressed by one of the witnesses; that the said cattle were probably attracted upon the right of way by the dead one; and I find that defendants knew or would have known by the exercise of ordinary care of the presence of the dead animal upon the right of way and knew or would have known by the exercise of such care, that if the gate

was open, that cattle would probably be attracted therein by the dead one or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified Miller of that fact and in time to have had the said cattle removed from the right of way; and I find that it was the duty of defendants and the section men upon the section upon which the said cattle were, to have removed said cattle, or failing so to do that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right of way and that they could have notified him, and in that case he could have been on the lookout for said cattle and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way under the circumstances and in failing to remove them from the right of way before the accident and in not giving the said Miller notice of their presence upon the right of way, and that such negligence was the proximate cause of the death of Miller. And that plaintiffs were actually damaged by his death in the sum hereafter stated.

5. I find that there is a substantial similarity between the laws of Louisiana and the laws of Texas giving right of action for injuries resulting in death, and under the law of Louisiana that Miller was not a fellow servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death, and was in the exercise of ordinary care.

II.

Conclusions of Law.

38 In view of the foregoing findings of fact, I conclude that under the law of Louisiana as well as under the law of Texas, the plaintiffs are entitled to a judgment against both defendants, and I so adjudge, and assess their damages in the sum of Sixteen Thousand (\$16,000.00) Dollars which I apportion among them as follows:

| | |
|------------------------|------------|
| Fannie L. Miller | \$8,000.00 |
| George W. Miller..... | 2,000.00 |
| William D. Miller..... | 2,500.00 |
| Dorace H. Miller..... | 3,500.00 |

CHAS. E. ASHE, *Judge*.

Filed Jan. 30th, 1909, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception #1.

(Filed Feb. 16, '09.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

Be it remembered: that on the 30th day of January, 1909, there came on to be heard and considered, in the above entitled and numbered cause, the defendant Louisiana Western Railway Company's plea to the jurisdiction and in abatement, embraced in Section II of its original answer on file, which reads as follows, to-wit:

"And in the event the Court shall have disregarded or overruled the affidavit and statement of C. W. Sedgwick, filed herein, with reference to the defect of service on this defendant, and only in such event and after excepting to such ruling and action of the Court, the said Louisiana Western Railway Company now under protest appears herein for the purpose of excepting and pleading to the jurisdiction of this Honorable Court, as follows, to-wit:

"Said defendant shows to the Court that, as appears on the face of plaintiffs' petition herein, the cause of action, if any the plaintiffs have, arose from acts and injuries occurring not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, if any, measured except and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the Court that the laws of Louisiana applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they will have to recover, if at all, and according to which the defenses to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applicable to any action accruing from a similar occurrence within the limits of the State of Texas; and that such inconsistency and dissimilarities between said laws of the two states of Louisiana and Texas are so pronounced and radical, that the Courts of this State, in the exercise of substantial justice and in comity and in accordance with the statute and the laws and public policies of this state, cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto, and defendant avers that it is informed and believes and upon such information and belief so charges that said dissimilarities and inconsistencies, aside from many others,

consist, and did at the time of the injuries and since, consist of the following features and differences in particular, to-wit:

(a) That at the time that the action, alleged in plaintiffs' petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of action, the parties and the remedy and the measure of damages, the law prevailing in the State of Texas on each of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana. That said laws of Louisiana provided, authorized and entertained no joint action in favor of the wife and children and no distribution among them of the sum awarded by the verdict according to the discretion of the jury, in a suit for the death of the husband and father, as authorized by the laws of the State of Texas; that said laws of Louisiana provided and entertained no action in favor of the adult children of a deceased person, arising out of his death, and limited the damages in such a case to that accruing to a minor child during its minority; that the laws of the State of Louisiana in cases in which damages were allowed to the surviving wife or minor children for injuries resulting in the death of the husband and father, included in and as part of such damages compensation for their wounded feelings and affections, caused by the death of the husband and father, and for the deprivation of the pleasure and comfort of his society, while the laws of the State of Texas, allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the pleasure and comfort of the society of the deceased.

(b) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of Louisiana, with reference to the doctrine of the negligence of fellow servants as a matter of defense to the Louisiana Western Railway Company, were and have remained and still are totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased's fellow servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana, when plead and proven, as this defendant proposes to do, if required to plead, an available defense, and would exempt defendant from liability in this action; yet, according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such defense as the negligence of a fellow servant would not avail as a bar to recovery.

(c) That the Louisiana Western Railway Company was, and is a corporation created by Special Act of the Legislature, known as Act. No. 21 of the Acts of the General Assembly of the State of Louisiana for the year, 1878, approved March 30, 1878, and said charter and Special Act declares and provides that the company shall not be responsible for the death or personal injury of any employé by any act of negligence on the part of the company, its officers, or employés. The portion of said Act referred to reads substantially as follows, to-wit:

"That said company, its officers or employees, shall not be liable

in any sum whatever, of damages or cost, in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any services as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service, upon said railroad, and upon all other railroads and transportation lines occupied and operated by said company, at their own risk as to personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers, or employees and the said company shall not be subject to any liability to any party for any such personal injury or loss of life.

“That by said Act of Legislature, the assumption of risk by the deceased, Miller, as an employee, and exemption from responsibility on the part of the defendant, Louisiana Western Railway Company for acts of alleged negligence of a fellow servant or any other servant or employee was largely extended beyond what it was at common law and that this became a matter of contract between the said defendant and the State of Louisiana, and a contract to which the deceased, Miller, by virtue of his employment and service became a party, and that the laws of the State of Louisiana under said charter and said contract, would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said Special Act of the Legislature above set forth were not, when enacted, nor since at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Court of the State of Texas, in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administer and apply said Special Act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

(d) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time, the laws of the State of Louisiana and the laws and practices of the Courts of the State of Texas were essentially different and conflicting in reference to the power and control of the trial and appellate judges over the findings and verdict of juries, and with reference to the number of verdicts that might be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict:

43 that while in the State of Louisiana and according to the laws and rules of practice as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion of the judge to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the State of Texas the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the concurrence of the entire jury is essential to the finding and return of a verdict.

Wherefore, the defendant, Louisiana Western Railway Company prays that this Court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs."

"And at the same time came on to be heard the similar plea to the jurisdiction and in abatement of the defendant Texas & New Orleans Railroad Company, as set forth and mentioned in section I of its First Amended Original Answer on file herein.

And it appearing to the Court that said cause had theretofore been continued without prejudice to said pleas and that it was opportune and proper that the same should be heard and considered, and the allegations of said pleas having been duly read by counsel in open Court, thereupon counsel for the respective defendants in support of said pleas offered and introduced the following evidence, to-wit:

First. Defendants offered and introduced the testimony of HENRY P. DART, by depositions taken in New Orleans, May 25th, 1908, reading as follows in question and answer form:

"Interrogatory No. 1.

Please state your name, age, residence, occupation and profession
A. Henry Plache Dart. I am fifty years old. New Orleans, La. Lawyer.

44

Interrogatory No. 2.

If in answer to the preceding interrogatory you have stated that you are an attorney and counselor at law, and are and have been engaged in the practice of your profession in the State of Louisiana then please state the period during which you have practiced your profession in said State, and the extent of your experience in such practice.

A. I was admitted to the Bar of Louisiana in New Orleans in February, 1879, and I am still in active practice, being the senior member of the law firm of Dart & Kernan, with offices in the Liverpool London & Globe Building, New Orleans, La.

I have enjoyed for many years and still enjoy a large practice in every branch of litigation, appearing before all the State Courts, the Federal Courts and the Supreme Court of the United States. During my whole professional life I have been constantly engaged in personal injury cases and have prosecuted and defended many such actions.

Interrogatory No. 3.

Please state whether, by virtue of your knowledge of and experience with reference to the principles and rules you are qualified and able to state with substantial accuracy the statutes of the laws of said state on the subject of rights of action for personal injuries resulting in death (if any) existing or accruing to surviving relatives, on account of damages or losses to such relatives by reason of the death; and whether you are familiar with and able to state with substantial accuracy, from your knowledge and experience, the laws in the State of Louisiana with reference to the measure and elements of damage (if any) allowed to surviving relatives in such cases, and with reference to the respective functions of the judges and juries in the trial of fact cases before juries, and the power and discretion of the trial or appellate judges to review, set aside, reform, alter, or remit judgments based upon the verdicts of juries.

45 A. I believe I am able and qualified by knowledge and experience to state with substantial accuracy the law and the practice in the Courts of Louisiana in such cases.

Interrogatory No. 4.

In the plaintiffs' petition in this case it is alleged, substantially that the plaintiffs, Felix Gross and Theresa Gross, husband and wife, are the surviving parents of Corley Gross, deceased, who on or about June 1st, 1905, was in the employment of the defendants as a locomotive fireman; and that while the locomotive which he was engaged and assisting to operate was drawing a passenger train through Calcasieu Parish, in the State of Louisiana, on the railway line of the Louisiana Western Railroad Company, at the usual speed, the locomotive encountered a beef, or other animal, lying on the track, and the engine and several of the cars were thereby derailed and turned over, as result of which the said Corley Gross was scalded and burned to such extent that he thereafter in about two weeks died, etc. The plaintiffs claim and pray for damages in the sum of twenty-five thousand dollars.

Please state whether the laws of Louisiana afford any right of action for personal injuries resulting in death by the wrongful conduct of another, in the State of Louisiana, for the benefit of any surviving relative; and if yea, please state the source and foundation of such right of action, and state briefly the history of the law in the State of Louisiana on this subject, up to and including the present time.

46 "A. The law of Louisiana confers a right of action for personal injuries inflicted by the wrongful conduct of another. In case of death the action survives for one year, from the death, in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them. This action does not survive in favor of any other relative. It has been decided, for instance, that grandparents are excluded from its benefits. The remedy thus afforded is statutory and appears in slightly different form in the earliest Code of Louisiana (See Digest of the Civil Laws, etc, pub-

lished in 1808 Sec. II Art. 16, p. 320) and has been amended from time to time and is now known as Article 2315 of the Revised Civil Code of Louisiana of 1870 which is the date of the last general revision of the Civil Code of Louisiana. This article has been amended by the Legislature of Louisiana since the date mentioned, the most recent amendment being that of 1884, so that the Article now reads as hereinafter set forth.

As I understand interrogatory Four the foregoing is the information wanted i. e. the origin and history of the right of action.

Interrogatory No. 5.

If in answer to the last preceding interrogatory you have stated that the right of action inquired about therein does exist and is recognized in the State of Louisiana, by virtue of a local statute or code, please give reference to the same and quote it at length, as part of your answer hereto.

A. The local statute which governs actions for personal injury as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language.

Article 2315; Obligation to Repair Damage Caused by Wrongful Acts; Survivorship of Action:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

Interrogatory No. 6.

47 If in answer to preceding interrogatories you have indicated the authority and basis (if any) upon which the courts in the State of Louisiana recognize and award damages for injuries resulting in death inflicted through the fault of another person, then please state what were the rules of law obtaining in the State of Louisiana on the date of the alleged injury, with reference to the measure of damage and elements of damages allowed for such injuries to those entitled to the action.

And in this connection state:

(a) Whether the damages so allowed the surviving parents and the surviving wife and children, include compensation for the wounded feelings and affections of the survivors, or for deprivation of the society of the deceased; and in this connection make reference to any decisions or other authorities on this subject; and

(b) State whether the facts that a deceased child for whose death the action was brought by the parents has passed its majority, is a

circumstance to be considered by the Judge or Jury in connection with the measure or amount of damages that may be awarded; and in this connection refer to any decision or other authority that may be convenient.

A. The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the Courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code however contains nine articles on the general subject, which in Louisiana goes by the title of "Offences and Quasi Offenses," the Articles being 2315 (already cited) to 2324 (inclusive) which articles I append to this answer, omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed before you. Of course these articles have been the subject of judicial construction and interpretation for many years and the decisions are from my point of view, 'law or authority,' under the Code, and you will so understand my answer.

48 The Articles above mentioned are as follows:

Article 2316: Negligence, Imprudence or Want of Skill:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317: Liability for acts of others and things in our charge:

We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications:

Article 2318: Acts of Minors: The father, or after his decease, the mother are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

The same responsibility attaches to the tutors of minors."

Article 2319: Acts of Insane Persons.

The curators of insane persons are answerable for the damage occasioned by those under their care."

Article 2320: Acts of Servants, etc.

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases responsibility only attaches when the masters

or employers, teachers and artisans might have prevented the act which caused the damage, and have not done it."

Article 2321: Animals.

The owner of an animal is answerable for the damage he has caused; but if the animal had been lost or strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment."

Article 2322: Building:

"The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Article 2323: Estimating Damages: Negligence:

"The damage caused is not always estimated at the exact value of the thing destroyed or injured, it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

Article 2324: Person assisting or encouraging Damage, Liable in Solido:

"He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act."

Before the adoption of the amendment of 1884, these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. *Wredenburg vs. Behan*, 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation.' *Van Amberg vs. R. R. Co.* 37 La. An. 652. *Eichhorn v. R. R. Co.* 112 La. 250; 36 S. R. 335.

Therefore as the law stood at the date of this accident and as it now stands the survivor may recover:

(1) The Damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see *Eichorn vs. R. R. Co.* 114 La. 718 et seq. 38 S. R. 526; *Payne vs. Lumber Company* 117 La. 991; 42 So. Rep. 475; *Dobyns vs. R. R.* 119 La. 82; 43 So. Rep. 934.

(3) To these elements the Court has now added recovery for mental suffering of the survivor. See *Stewart vs. R. R.* 112 La. 767; 36 So. Rep. 676 as applied in *Graham vs. Telegraph Company*

109 La. 1070, 34 So. Rep. 91; Parker vs. Lumber Co. 115 La. 463; 39 So. Rep. 445 and note the qualification in Brinkman vs. Oil Co. 118 La. 846; 43 So. Rep. 458.

(4) Vindictive or punitive damages are not permitted in actions for personal injury against a corporation: McGary vs. City 12 Rep. (La. Reports) 675; McFee vs. R. R. Co. 42 La. An. 790. Patterson vs. R. R. Co. 110 La. 797, 34 So. Rep. 782 and Parkerson case 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. Huberwald vs. R. R. Co., 50 La. An. 477; 23 So. Rep. 474. In Eichorn vs. New Orleans & Carrollton R. R. Co. 114 La. 712 38 So. Rep. 529-531 you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached majority since then. The age of majority in Louisiana is 21 years. Where the action runs in favor of minors, the damages are apportioned according to their respective majorities. See Eichorn's case 114 La. at p. 726.

(6) Children, under the code of Louisiana, Article 229, are bound to maintain their father and mother and other ascendants who are in need, on the other hand the child under Article 216 of the Civil Code remains under the authority of his parents until majority:

There is also further provision Articles 230-231, defining alimony as 'what is necessary for the nourishment, lodging and support of the person who claims it.'

In Myhan vs. Electric Co. 41 La. An. 969 the parents claimed for the death of a son of eighteen years. The Court referring to his duty said: "The probability is that he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities, etc.'

This would indicate that the child over majority owes a certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question six subsection (b) must be answered in the affirmative. In the Myhan case the Court allowed \$2000.00 for the death, as a sum that would relieve the parents 'for a while to some extent from the immediate consequence attending the severe injury inflicted on them.'

The Supreme Court of Louisiana has decided that the restrictive clause of Article 2320 has been read out of the Article as the result of the Jurisprudence of this State.

As to this it is said in Weaver vs. Goulden 116 La. 473 40 So. Rep. 798 as follows: "as to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents." And further it is said "Even as between individuals

this restriction has been virtually ignored in the latter decisions of this Court."

Interrogatory No. 7.

Please state whether there now exists, or did exist at the time of the injury and death of Corley Gross, above mentioned, in the State of Louisiana, any statutory rule or code provision in reference to the doctrine of the relation of fellow servants, as a defense to an action against the master for the servant's injury, and altering and varying the common-law rule on that subject.

A. On the 1st of June, 1905, and for many years prior thereto to the statutory authority for an action for personal injuries by the servant against the master was the Articles 2317 and 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter.

There is no statutory or codal provision in Louisiana on the subject of the relation of fellow servants, as a defence to the master. The question came before the Supreme Court of Louisiana in May, 1851, for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. See *Hubgh vs. New Orleans & Carrollton R. R. Co.* 6 An. 495 to 514 (inc.). On its original hearing the Court based its opinion upon the case of *Priestley vs. Fowler*, 3 M. & W. 1. On a rehearing the Court rejected the Plaintiff's demand upon the ground that no action was then permitted for the death of a human being, and the rehearing opinion did not touch upon the question of fellow servant, but as the case has often been cited on the first proposition and that doctrine so often approved, that it is now part of the jurisprudence of Louisiana.

I have in some of the following citations referred to causes where the question is discussed authoritatively. See also *Weaver vs. Logging Co.* 16 La. 468 — So. Rep. 798, decided in March, 1906. This case contains a restatement of the law of Louisiana as it now exists. Referring to the *Hubgh* case, the Court said, page 472: 'The doctrine that the servant assumes the risks of his fellow servant's negligence was examined in the *Hubgh* case and has ever since been uniformly followed in the jurisprudence of this State. This doctrine is based on an implied agreement that the servant undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant *Id.* This rule of law seems to us to be reasonable and just, as otherwise the master might be held liable without any fault whatever on his part for an accidental injury by one servant on his fellow. 'At the conclusion of the opinion (40 So. Rep. 800) you will find that the Court says further as follows: 'This court has recognized and enforced to a certain extent the common law doctrine of fellow servants. The original doctrine has been modified in England and in many of our sister states by legislation. It may be said in general terms that the present jurisprudence of this State conforms to what is commonly called the 'superior servant' doctrine, and recognizes only as

fellow servants those persons who are engaged in a common work under a common employment.' See particularly *Bell vs. Globe Lumber Co.* 107 La. 725, 31 So. Rep. 994.

I would answer further on the case stated that the engineer and fireman in the operation of the locomotive are fellow servants. See cases above referred to and *Satterly vs. Morgan Louisiana & Texas R. R. & S. S. Co.* 35 La. An. 1165 and statements *arguendo* in the *Towns vs. R. R. Co.* case 37 La. An. 632. See also *Jones vs. Southern Pacific Co.* 144 Fed. Rep. 973.

Interrogatory No. 8.

Please state whether a locomotive engineer operating the engine and the fireman accompanying and co-operating with him on the same locomotive, and at the same time, and neither having the authority to employ or discharge the other, were or would be deemed by the Courts, and according to the laws of the State of Louisiana existing at the time of this alleged injury, and since, fellow-servants with each other, within and according to the meaning of the fellow servant doctrine, as a defense to the master in an action for injury through the fault of either one or the other of said servants. In answering this question please refer to such recent and well founded decisions, or other authorities, announcing the law of Louisiana on this subject, as you may find convenient.

A. They would be fellow servants. I have cited the decisions in the former answer.

54

Interrogatory No. 9.

In this action the plaintiffs contend that the injury and death were due to the fault of the defendants in permitting cows or other stock to get upon their tracks in the State of Louisiana.

Please state what (if any) statutes or code provisions existed or obtained in the State of Louisiana on the subject of fencing railroads at the time of the injury complained of in this suit, or subsequently, and whether there was any rule announced, either by the statutes or codes of Louisiana, or by the Courts in their decisions, requiring railroad companies having and operating railroads in that state to fence their railroads or tracks. And if there was any statutory provision or decision on this subject, either requiring or dispensing with such course on the part of railroad companies, then please refer to the same and identify it as part of your answer hereto.

A. There was no statute in Louisiana on the subject of fencing railroads at the time of the injury complained of in this suit or subsequently.

I know of no decisions of the Courts of Louisiana requiring Railroad Companies having and operating railroads in this State to fence the railroads or tracks.

Interrogatory No. 10.

Please state whether you are familiar with the history and organization and properties of the Louisiana Western Railroad Company,

which is one of the defendants in this case; and if yea, please state such history and indicate the location of its railroads and other properties and the date and method of its incorporation.

A. I am not familiar with the history and organization and properties of the Louisiana Western Railroad Company.

Interrogatory 11.

55 If in answer to the last preceding interrogatory you have stated that the Louisiana Western Railroad Company is a railroad corporation, organized and chartered by an Act of Louisiana Legislature, which became effective March 30th, 1878, then please attach a copy of this legislative act as part of your answer to this interrogatory, and identify the same by writing your name upon it.

A. It appears that the Louisiana Western Railroad Company was incorporated by Act 21 of the Acts of the General Assembly of Louisiana for the year 1878, and was approved on March 30th of that year and is to be found printed and bound in the official publication of the Acts of the Legislature for the year 1878, on pages 258 and 268 (inc.). This act consists of ten closely printed pages, is accessible and is admissibly in evidence under the laws of the *this* State and I presume under the laws of Texas, in the form of its official publication, as above stated, and therefore I do not undertake to attach a copy of same to my answers.

Interrogatory No. 12.

Section 17 of the Act of the Louisiana Legislature, which was approved and became effective March 30th, 1878, and purports to have created and chartered the Louisiana Western Railroad Company, reads as follows:

SEC. 17. Be it further enacted, etc., "That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or
56 rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury

to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life.

Will you please state whether, since the passage and approval of this Act, any amendment or other alteration has been made by the Legislature, or any other authority, altering or eliminating the language or effect of Section 17 of said Act, as above quoted.

A. I do not know of any amendment or alteration by the Legislature or any other authority altering or eliminating the language or effect of Section 17 of said Act, as quoted in this interrogatory.

Interrogatory No. 13.

Are you familiar with the constitution of the State of Louisiana, known as the constitution of 1898? If yea, please state whether said constitution contains the following provision, substantially, to-wit:

"The General Assembly shall not pass any local or special law on the following specified objects * * * creating corporations, or amending, renewing, extending or explaining a charter thereof. * * * Grant any corporation, association or individual any special or exclusive right, privilege or immunity."

57 If you state that the provisions above quoted are contained in the Constitution of Louisiana of 1898, then please state, if you know, when such provisions were first adopted and became effective; and state whether such provisions had been adopted and existed as part of the Constitution of the State of Louisiana on March 30th, 1878, when the Act heretofore mentioned, chartering and creating the Louisiana Western Railroad Company became effective.

A. I am familiar with the Constitution of Louisiana of 1898. It does contain the clause quoted, Article 48. I find a similar provision in the Constitution of 1879, Article 46, adopted July 23rd, 1879. These Constitutions were not adopted and were not in force at the time of the passage of the Act of 1878 aforesaid. There was no such provision in the Louisiana Constitution of 1868 in force at the time of the passage of the Charter of the Louisiana Western Railroad Company on March 30th, 1878. This law was passed under the dominion of the Constitution of 1868.

Interrogatory No. 14.

If convenient, please attach an authentic or examined copy of the Constitution of the State of Louisiana as the same existed on the 30th day of March, 1878, or make reference to some authentic code in which such constitution may be found.

A. I have not convenient a spare copy of the Constitution of Louisiana of 1868, which was the Constitution existing on the 30th day of March, 1878, but you will find a printed copy thereof issued in the Volume of the Revised Statutes of Louisiana, printed by authority of the State of Louisiana in 1870.

Interrogatory No. 15.

Please state and explain the respective provinces and functions of the judge and jury, according to the laws and practices of the State of Louisiana, with reference to the trial and final determination of issues of fact in the trial of cases before a jury in that state.

A. In a trial before a jury under the practice in Louisiana, the jury is the judge of both fact and law. They are sole judges
58 of the facts and are supposed to take the law from the Court.

The trial judges discuss in the charge the evidence only in a most general way, and they make no attempt to influence the jury by their opinion in reference to the evidence. They confine themselves as a rule to general reference and to the general rules of law, which would aid the jury in finding the truth. The result is that a trial before a jury up to the moment of the verdict is more like a hearing before an Examiner in Chancery, than anything else I can think of.

The Jury in a civil cause is composed of twelve members, nine of whom may find a verdict.

Interrogatory No. 16.

What right or power of control does a trial judge have (if any) over the verdict of the jury in the state of Louisiana, as to findings of fact, either on the question of liability or the amount of damages awarded.

A. The trial judge has the right to set aside the verdict of the jury, if he disagrees with its conclusions on the facts or on the amount of damages awarded. There is no limit to the judge's right to set aside the verdict, when he is not in accord with it on either ground. See: State ex rel. Snider 47 La. An. 1482. In other words the trial judge may grant as many new trials as he sees fit. In the case just quoted three successive verdicts in favor of the Plaintiff were set aside by the trial judge and an attempt was made to mandamus him in the Supreme Court, to compel him to sign one of those judgments, and it was held that the Supreme Court had no power to do so. On the other hand the trial judge may force a remittitur under pain of new trial if he considers the verdict excessive and there is no power to interfere with his conduct in this respect. Landry vs. Ship Co. 112 La. 515, 36 So. Rep. 548.

Interrogatory No. 17.

59 What right, power or control, under the laws, practices and decisions of the State of Louisiana, do the appellate courts of that state have and exercise over the verdicts of juries, in damage cases for personal injury resulting in death, such as this. Explain fully, and if convenient, refer to some examples of practices in this regard.

A. The Supreme Court and other appellate Courts of Louisiana examine the evidence in all cases, including those in actions for personal injury and decide upon the facts, as they find them, without reference to the verdict of juries. In other words, the verdict of a

jury, particularly in cases of that nature against corporations, has no sacramental weight and is not regarded as a final finding of facts. All the evidence is carried before the appellate Courts for re-examination and review. *Warner vs. Talbot* 112 La. 831, 36 So. Rep. 743; *Schlater vs. Wilbut* 41 La. An. 406—*Wood vs. Jones*, 34 La. An. 1086.

Interrogatory No. 18.

Please state fully, and illustrate, what latitude and discretion (if any) is allowed to and practiced by the judges of the trial courts and of the appellate courts of the State of Louisiana, in referring or rendering judgments, or causing remittiturs to be entered in case of judgments based upon the verdicts of juries; and if you are familiar with the rules and practices of the Courts of the State of Texas upon these subjects, please compare the rules and practices of the two states in this regard, and indicate the differences (if any).

A. I have answered this interrogatory in answering the preceding interrogatories. I am not familiar with the rules and practice in the State of Texas on these subjects and therefore do not make any comparison.

Interrogatory No. 19.

From what system of law did the mutual rights and obligations and remedies obtaining between Master and servant, as recognized and administered by the Courts of the State of Louisiana
60 originate? Are they founded in the common law, or the Civil law, and which system do they follow and conform to more closely? Explain fully.

A. The system of law regulating the obligations and remedies obtaining between master and servant, as recognized and adopted by the Courts of Louisiana originates in the statutes already quoted. Those statutes in turn were derived with modifications from the Civil law, as you will find explained in the case of *Weaver vs. Goulden* 116 La. 468, 40 So. Rep. 798; and the Common Law has been applied to a certain extent. I could with propriety say that our jurisprudence is *sui generis*—a conglomeration of many systems, with the State Statutes as a basis, and the impression and convictions of the judges as the solution. I prefer however to refer to the *Weaver* case, as an answer to the enquiry contained in the last question of this Interrogatory. I ought to add however that it does not seem to me that our Courts adhere very closely even to their own prior decisions on the subject. The Supreme Court seems to have a strong tendency to make each case turn on its own facts, with the inclination to adopt any exception to the rule, which it can find, where the facts seem to justify this departure from the cases.

Cross-interrogatories.

1. Are you regularly retained by the defendant company as its counsel in any of the courts in your State, or elsewhere?

A. I am not counsel for the defendant company in any of the courts of this State or elsewhere or otherwise.

2. It is true, is it not, that the word 'fault' in your Statute giving

a right of action for death means substantially the same as 'negligence' or 'carelessness' in the common law?

A. I should hesitate to answer this affirmatively, for the reason that our Court has displayed a disposition to release the defendant or to condemn it, where the fault was slight on either side, as the facts might be.

Substantially the word 'fault' as a rule means under our law such active or passive conduct as has brought about the injury in question.

3. It is true, is it not, that the aid of your Statute is to give pecuniary compensation for the loss sustained in such cases?

A. I think the aim of our statute is to give pecuniary compensation for the loss sustained in such cases.

4.

Will you please refer to the case of Texas & Pacific R. R. Co. against Ida May Cox, reported in 145 U. S. 593-608, and in Book 36 L. Ed. pages 829-834, and if you are not already familiar with the opinion, please read the same and see, whether the acts of Louisiana purporting to be set forth in the margin, at bottom page 830, is a true copy of the original act of your state? Also please state whether you concur in what Chief Justice Fuller of the Supreme Court of the United States has to say regarding the similarity of the Texas statute, also set out in the margin at the same place, and your statute.—'The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas?' If you do not concur with the Chief Justice in the entire statement, do you agree with him that the Two Statutes 'are not essentially dissimilar?'

A. I have read the case of Cox 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original.

Concerning the remainder of the question, I do not think I am called upon to express an opinion, as I know nothing of the settled public policy of Texas. The Statutes as printed do not seem to me to be other than as suggested by the opinion. The Special Act of 1878 creating the Louisiana Western Railroad Company does not seem to have been one of the issues in that case.

V.

If in answer to direct interrogatory No. 7, you say there was any statutory rule or code provision of the character inquired about in force at the time of the death of Corley Gross, please attach a true copy of the same to your answer hereto marking it with your initials for identification, and state when such statutory rule or code provision became effective, and how long it continued in force?

A. I have copied into my answers to the direct interrogatories herein all the statutory rules and codal provisions of Louisiana governing the subject and I have indicated a published volume where the same could be found and verified with my own quotations. I

have also answered on the direct examination the other parts of this question.

VI.

It is true, is it not, that the laws of Louisiana both statute and common, as construed by the Courts of last resort of the State, imposed upon railroad corporations, operating railroads within the state and upon the defendant corporation, that is, upon the defendant Louisiana & Western Ry. Co. the duty to use ordinary care to furnish their employés with reasonable safe place in which to work, with reasonable safe instrumentalities with which to work, and reasonably safe employés with whom to work, and that a failure to use such care would constitute 'fault' within the meaning of your statute, or 'negligence' within the meaning of the law?

A. The Statutory law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work, reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and there existing and the knowledge of the employee of the same, and a failure to do so would constitute 'fault' within the meaning of this statute and such fault would be negligence within the meaning of the law. Woods vs. Jones 34 La. An. 1086 — Gusman vs. Caffery Co. 49 La. An. p. 1264 22, So. Rep. 742 Henry vs. Lumber Co. 48 La. An. 950, 20 So. Rep. 221: Smith vs. Sellars 40 La. An. 527 — So. Rep. —.

VII.

Has there ever been a case of the character of this one before your courts for adjudication, and if so, please state the Courts and the decisions made, and if the case reached your Supreme Court, please give any reference to the volume and page where the same is reported, and also the volume and page of the Southern Reporter where the same is reported? If there are more than one case, give the reference where each may be found as above stated?

A. I refer you to the cases cited and also to Van Amberg vs. R. R. Co. 37 La. An. 650—Wallis vs. Morgan's L. & T. R. R. Co. 38 La. An. 156—Gusman vs. Caffery Co. 49 La. An. 1269—70, 22 So. Rep. 742—Jones vs. Ry. Co. 51 La. An. 1247—Merchant vs. Price Woods Co. 107 La. 563—Fuller vs. Tremont Co. 114 La. 267, 38 So. Rep. 164—Harris vs. Lumber Co. 115 La. 977 So. Rep. 374.

VIII.

Does the case of Ross vs. Summit Lumber Co. 44 So. Rep. 333 et seq. correctly state the rules applied by your Supreme Court in cases of that character?

A. I think that the case of Roff vs. Summit Lumber Co. 44 So. Rep. 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of Bell vs. Lumber Company 107 La. 731, 31 So. Rep. 994—Stuck's case 23 So. Rep. 342—Merritt's case 35 So. Rep. 499 Evans' case 35 So. Rep. 736 and Duncan vs.

64 R. R. 51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject mat-

9.

If you say there was no statute on the subject of fencing railroads in your state, on the date of the death of Corley Gross, then please state, whether your courts of last resort had ever held up to that time, that the failure to fence might be taken into account by a jury in determining the question of negligence on the part of the railroad company, for an injury caused to a passenger or to an employé by the derailment of an engine or train citing the page and volume where the case or cases may be found?

A. I am not aware of any case decided by our Supreme Court on the subject matter of this Interrogatory.

10.

Is it not true that the rules of the common law as generally understood throughout the United States are looked to by the courts determining the questions of contributory negligence and assumed risks in action for death and personal injury brought by servants against their masters, in your state?

A. I am not able to say that the rules of the Common Law as generally understood throughout the United States are looked to in the Louisiana in determining questions of contributory negligence and assumption of risk in actions for personal injury brought by servants against their masters. I refer to my testimony already given here. My understanding is that the Supreme Court of this State determines in each case whether there is contributory negligence primarily as a matter of fact, and the rule is general that if on the whole case it appears that the accident would not have happened but for the negligence of the injured person contributing thereto, there can be no recovery. In considering this the doctrine of the 'last clear chance' plays its part.

I have already shown by reference to the cases of Hibgh Weaver and Duncan and other cases cited, that the servant is as a matter of law, supposed to assume the risk of personal injury, sub-
65 ject to the qualifications stated in these cases. The Evans and Merritt cases indicate this also. It is clearly stated in the Weaver case that the servant whose negligence is assumed as one of the risks of employment, is a person actually engaged on the same physical work with the injured person.

11.

If you conceive there is a difference or dissimilarity between the rules of the common law as applied in your state and in Texas in such cases please point out wherein the difference consists as you understand it?

A. I am not familiar with the rules of the Common Law as applied in Texas, and cannot undertake to make the comparison suggested. The references I have made to the Louisiana cases will enable you to make the comparison.

12.

Please state, who are, and who are not, fellow servants under the law of your state, and the law to which you look in determining the question?

A. I have cited cases ante, showing illustrations of who are and who are not fellow servants, under the laws of Louisiana. It would be impossible to make a complete list of all the cases bearing upon that subject with the time at my disposal. The Court, as is decided in the Weaver case, has adopted to a certain extent the 'superior servant doctrine' I understand, as I have already stated, that they look in each case at the facts, to ascertain whether the servants involved were or were not actually engaged on the same task, at the same time and with one common object. I understand that contemporaneousness and the presence of each other, is one of the tests to determine whether the negligence of one affects the other. To illustrate by the cases cited, I should say that two servants in separate departments on the same work actually engaged in a task in which they were in contact with each other, would be fellow servants to the discharge of the master.

Unquestionably in determining a question of this character the Supreme Court follows its own statute and decisions, 66 if there be any, but if the question is 'res nova' authorities from any respectable source are considered, as they should be, as assisting to a conclusion.

13.

If you say the charter of the Louisiana & Western Ry. Co. contains the provisions set out in direct interrogatory No. 12, then please state, whether such provisions granted the corporations 'any special or exclusive rights privileges or immunity.'

A. At the time the Charter of the Louisiana Western Railway Company was granted by the Legislature of Louisiana in 1878, it had the authority under the Constitution of Louisiana to create corporation by Special Act, a power which it frequently exercised, in fact it may be said to have been the public policy at that time.

Whether the provisions referred to are 'special or exclusive rights, privileges or immunities' it would seem to me, is a matter for judicial determination. In the absence of any provision in the Constitution of 1868 prohibiting same I would hesitate to pronounce the provisions in question to be in that category. In a legislative charter it would seem to me, to be entirely within the province of the Legislature, unrestricted by constitutional limitations, to grant, limit or specify the rights, duties, powers, etc., of its own creature. In this connection you will recall that the Constitution of 1868, already referred to, is that Constitution under which the Acts were passed which are interpreted in the Slaughter House cases in the Supreme Court of the United States.

14.

Has the said provision ever been construed by your courts of last resort as to the question of its being opposed to the public policy

of your state? Has its constitutionality, either under your
 67 own constitution, prior to the date of the accident, or under
 the constitution of the United States ever been passed upon?
 Has it ever been held valid or invalid by any of your courts? In
 answering the foregoing questions, please refer to your official Re-
 porter, and the Southern Reporter for the decision that may have
 been made, if any, on the point?

A. I am not aware of any decision construing this particular
 provision of the Charter of the Louisiana Western Railway Com-
 pany. Other provisions of the same Statute have been passed upon
 by the Supreme Court, thus the provision giving that corporation
 the right to expropriate property by special procedure was recog-
 nized and enforced in *La. Western R. R. Co. vs. Central & Improve-*
ment Company 119 La. 927 44 So. Rep. 732; also the special privi-
 lege in the charter of the *Morgan's Louisiana & Texas R. R. & S. S.*
Co. Act. No. 37 of 1877 in regard to immunity from suit except at
 domicile was affirmed in *Heirs of Gassin vs. Williams et als.* 36
 La. An. 187 and *St. Julian vs. Morgan's La. & Tex. R. R. & S. S.*
 Co. 39 La. An. 1063.

15.

Did the corporation ever at any time surrender its right to claim
 the 'privilege or immunity' granted by the said provisions?

A. I have never represented the defendant corporation and there-
 fore cannot answer this question. I have no knowledge of the sub-
 ject matter.

16.

Do you believe the provision valid or invalid.

A. I should consider the provision valid. I have indicated this
 opinion in a previous answer, and I add this additional reason, that
 the right to recover for such injuries being statutory in Louisiana,
 it would seem reasonable where the Legislature has the right to
 create a corporation by special Act, that it would safeguard the grant
 or regulate or control rights or privileges under it, with the
 68 same validity that it could make the original grant.

17.

Has the provision ever been pleaded by the corporation as a de-
 fense to any suit in any of your courts, and if so, please name some
 of the cases and courts and the rulings made?

A. In answer hereto I repeat the answer to cross Interrogatory
 Fifteen.

18.

It is true, is it not, that during the period since the granting of
 the charter, there have been many suits against the Corporations
 of the character referred to in the said charter provision? Has the
 company set up the same in the suits as a defense? Has it ever done
 it? If it has not done it, state why it has not availed itself of the
 provision as a defense?

A. For the reasons given in answer to Cross Interrogatory Fifteen.

I can only repeat that answer. I know nothing whatever about the subject matter.

19.

In what form was the charter of the Louisiana & Western Ry. Co. granted? Where may the charter be found? Is it evidenced alone by legislative grant, or is there any paper writing evidencing it? If yea, in whose possession is it, and in whose possession has it been and where has it been kept since it was made?

A. I have shown in my previous answers on direct and cross examinations that the charter is a legislative one and I have indicated where it could be found. In this State the printed Acts of the Legislature are received just as you would receive the Original Act, as passed, signed and promulgated. I imagine that the original custodian of these acts was the Secretary of State of Louisiana. I have never had occasion to hunt down the original of any Act of the Legislature and therefore answer as I do.

20.

69 Has the charter the standing of a public law or of a private act? Do your Courts take judicial notice of it, or is it necessary to prove it in order to get it before the Courts under your practice and law?

A. I should consider this charter to partake of both characters. It is unquestionably a law, but I am not aware of any decision holding that the Courts take official notice of it. I should consider it necessary to prove it in order to get it before the Courts under our practice and law, in any event, that's the course I would follow if I were seeking to maintain it before our Courts.

21.

If the Louisiana Western Ry. Co. should wish to avail itself of the said provision, in its charter as a defense to any action brought against it of the character therein mentioned, would or would it not be necessary for the corporation to specially plead and prove the said provision?

A. In the absence of decisions upon the subject I should certainly plead and offer the Statute, if I were to defend the case. The proof of it in this State would be a mere matter of offering the printed volume containing the Act, which is issued under the authority of the State of Louisiana.

22.

Were the employes at and prior to the time of the death of said Gross advised in any way of the existence of the said provision in the charter and of the effect that it had upon their rights as employes in case they should be injured in the service of the corporation?

A. I know nothing of the facts of this case, except those set out in the several interrogatories and therefore I cannot answer this question.

23.

If you say they were, please state the manner in which they were

advised? Please be explicit. Can you say that Corley Gross knew of the existence of the said provision and knew the effect it would have on the right of his parents in case he should be killed while in the service of the corporation? A. I make the answer that I have made in answer to Interrogatory No. Twenty-two, just answered.

24.

Since the granting of the charter have you adopted any constitutional provisions which nullify or neutralize the effect of said provision, and if so, please attach an examined copy of such provisions, and state when they became effective?

A. I am not aware of any Constitutional provisions which nullifies or neutralizes the provisions of the Charter aforesaid. As to the effect of the Article of the Constitution of 1879 and 1898 referred to in Interrogatory No. Thirteen, I would not consider these provisions to have the effect of nullifying or neutralizing the charter aforesaid.

25.

You have been asked in a number of the direct interrogatories to refer to decisions of your courts in support of your statement of the different rules *if* law having reference to actions for death in your state, if the decisions to which you refer have been qualified, modified, explained or overruled, please point out the cases in the volumes of your Reporter and of the Southern Reporter where this has been done?

A. I am not aware of any of the decisions referred to in previous answers have been qualified, modified, explained or overruled. I have quoted cases which refer to all the cases used in these answers. I have endeavored to give a fair reference to the jurisprudence on the subject matter."

Second. The defendants next offered and introduced in evidence Act No. 21 of 1878 of the Legislature of the State of Louisiana, approved March 30th, 1878, creating the corporation of the Louisiana Western Railroad Company one of the defendants in this cause, said Special Act, after conferring and imposing general powers and duties ordinarily incident to a railroad company maintaining and operating railroads and trains within the State of Louisiana contains the following provisions, to-wit:

SEC. 17. Be it further enacted, etc. That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness, or negligence on the part of said Company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon the railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said Company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negli-

gence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

In this connection it was agreed between the counsel for all parties and with the consent of the Court, that reference may be had, for the purpose of this record, to the original of said Act as regularly published and printed under authority of the State of Louisiana, for the purpose of ascertaining each and all of the provisions thereof.

Third. The defendants next offered and introduced in evidence the State Constitution of 1868 of the State of Louisiana, and in this connection it was agreed between counsel of all parties and with the consent of the Court, that reference may be had, for the purpose of this case, to the said constitution as the same is printed in the Louisiana Revised Statute of 1870, issued under the authority of the State of Louisiana.

Fourth. The defendants offered and introduced in evidence in connection with the depositions of H. P. Dart, Article 2315 of the Revised Civil Code of Louisiana of 1870, page 283, which reads as follows:

Art. 2315 (2294).—Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them, for the space of one year from the death."

Fifth. The defendants next offered and introduced in evidence, in connection with the depositions of H. P. Dart, and to establish the contention that the clause in the Special Act giving immunity from liability is valid, the following reported decisions; Louisiana Western Railroad Company vs. Central Improvement Company, 119 La. 927; 44 So. Rep. 732.

Heirs of Gassin vs. Williams et al., 36 La. An. 187.

St. Julian vs. Morgan's La. & Texas R. R. & S. S. Co., 39 La. An. 1063;

Butchers Benevolent Assn. vs. Crescent City (U. S. Sup. Ct.) 21 Law Ed. 394.

Butchers Union S. S. Co. vs. Crescent L. S. Co. 28 Law Ed. 585 U. S. Sup. Ct.

Pecot vs. Police Jury, 41 La. 707 6 So. Rep. 677.

Vredenburg vs. Behan, 33 La. An. 643.

Idem: 37 La. An. 652.

73 Sixth. The defendant offered and introduced in evidence the following adjudicated cases and decisions, in connection with the depositions of the witness, H. P. Dart, and in support of their contention of substantial variance between the laws of Texas and Louisiana:

Eichorn vs. R. R. Co. 112 La. 250 36 So. Rep. 335.

R. R. Co. vs. Richards 68 Tex. 375.

On mental suffering as a measure of damages in Louisiana:

Stewart vs. Ry. Co. 112 La. 767, 36 So. Rep. 676.

Graham vs. Telegraph Co. 109 La., 1070 34 So. Rep. 91.

Parker vs. Lumber Co. 115 La., 463; 39 So. Rep. 445;

Brinkman vs. Oil Co., 118 La., 846; 43 So. Rep. 458.

On Fellow Servants:

Hubgh vs. N. O. & Carrollton R. R. Co., 6 An. 495-514.

Weaver vs. Logging Co., 116 La. 468; 40 So. Rep. 798.

On the limitation of power of juries in Louisiana:

Snider, 47 La. An., 1482.

Warner vs. Talbot, 112 La. 831; 36 So. Rep. 743.

Schlater vs. Wilbut, 41 La. An. 406.

Woods vs. Jones, 34 An. 1086.

Weaver vs. Goulden, 116 La. 468; 40 So. 798.

The plaintiffs here offered and introduced in evidence, in connection with said plea, the Fifth, Sixth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth Direct Interrogatories propounded to the witness, H. P. Dart and his respective answers thereto, together with the authorities therein cited by him, all of which interrogatories and answers are hereinbefore fully set out.

And the plaintiffs by counsel, also offered the Second, Third, Fourth, Sixth, Seventh, Eighth Cross Interrogatories propounded to the witness H. P. Dart, and said witness's respective answers thereto, together with the authorities therein cited by him, all of such

74 cross interrogatories and said answers and citations are hereinbefore fully set out.

The plaintiffs by counsel thereupon offered and introduced in evidence the decision of;

Whitworth vs. Lumber Company, 46 So. Rep. 912; and

Taylor vs. Company, 46 So. Rep. 703; also

Day vs. Louisiana Western Railway Company.

Ry. Co. vs. Cox (U. S. Sup. Ct.) 145 U. S. 593.

It was agreed by counsel of all parties in open Court and with consent of the trial judge, that for the purposes of hearing and determining the said pleas to jurisdiction and in abatement the various adjudicated cases and decisions which were introduced by both parties and cited in the depositions of the witness H. P. Dart and introduced and read in evidence, as above recited, should be regarded as before the Court and in the record and that the reports thereof as

made and set forth in the printed volume of the Louisiana Reports and the Southern Reporter and the Federal Reporter and the United States Supreme Court reports, should be adopted and referred to as part of the record in this cause, for the purpose of determining the extent and effect of such decisions.

It was further understood and agreed between counsel, with the consent of the Court, that the evidence introduced on the merits by and on behalf of plaintiffs, either originally by them or on cross examination by their counsel, should be considered by the Court in passing upon the pleas to the jurisdiction and in abatement, and was in fact so considered; and reference is made to the statement of facts herein for such evidence.

And the Court having heard the said pleas to the jurisdiction and in abatement, together with the aforesaid evidence introduced thereon, and having heard argument of counsel, doth find and consider that the said pleas are not well taken and hereby overrules the same, in all things, and to this ruling of the Court the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, and each of them, then and there in open Court duly excepted, and here now tender this their joint bill of exception and pray that same be allowed and approved as part of the record in this cause; and it is accordingly so ordered.

CHAS. E. ASHE,

*Judge 11th Judicial District Court,
Harris County, Texas.*

Filed Febr'y 16th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception # 2.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

Be it remembered; that upon and during the trial of the above entitled and numbered cause on its merits the plaintiffs offered in evidence Printed Rule No. 334, the same being contained and expressed in a book of rules and regulations of the operating department of the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, Revised Edition, issued September 1, 1902, and admitted to have been in force on the railroad of the Louisiana Western Railroad Company

in Louisiana at the time of the death of Miller and Gross, but there being no recital or notation on or in connection with said book of rules that it had been promulgated or issued under the authority of the Texas & New Orleans Railroad Company; the said Rule No. 334 offered reads as follows, to-wit:

76 "It is the duty of every employé, regardless of department, to report defects in road or bridges, or obstructions of any kind, to the superintendent, and, if possible, to the nearest section or bridge foreman. When necessary, flags and torpedoes must be left to notify approaching trains; and when there is any reason to believe that the safety of the track of any structure is endangered by flood, fire or other causes, any employé, before attempting its use, must make a personal inspection, using all precautions in the interest of life and property."

The defendants, Louisiana & Western Railroad Company and the Texas & New Orleans Railroad Company, and each of them, for itself, then and there objected to the reading and introduction of said printed rule, for the reason that same was irrelevant and immaterial to any issue in the case as to either of said defendants.

These objections the Court overruled and permitted the plaintiffs to read and introduce said rule in evidence, and to this ruling of the Court the defendants, and each of them, for itself, then and there duly excepted and here tender this a joint and several bill of exception No. 2 and pray that same be allowed and certified as part of the record in this cause; and it is accordingly so ordered.

CHAS. E. ASHE, *Judge*.

Filed February 16th, 1909, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception # 3.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD CO. et al.

Be it remembered: That upon and during the trial of the above entitled and numbered cause on its merits the plaintiffs
77 offered in evidence Printed Rule No. 420, the same being contained and expressed in a book of rules and regulations of the operating department of the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, Revised Edition, issued September 1, 1902, and admitted to have been in force on the railroad of the Louisiana West-

ern Railroad Company in Louisiana at the time of the death of Miller and Gross, but there being no recital or notation on or in connection with said book of rules that it had been promulgated or issued under the authority of the Texas & New Orleans Railroad Company; the said Rule No. 420 offered reads as follows, to-wit:

"The track must be kept clear; and it is the duty of the foremen to turn out promptly with all their men and remove any obstruction, whenever notified by trainmen or others, even though the obstruction may not be on their sections. If notified of broken rails on an adjoining section they must at once make track safe for trains."

The defendants, Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company, and each of them, for itself, then and there objected to the reading and introduction of said printed rule, for the reason that same was irrelevant and immaterial to any issue in the case as to either of said defendants.

These objections the Court overruled and permitted the plaintiffs to read and introduce said rule in evidence and to this ruling of the Court the defendants, and each of them for itself, then and there duly excepted and here tender this a joint and several bill of exception No. 3 and pray that same be allowed and certified as part of the record in this cause, and it is accordingly so ordered.

CHAS. E. ASHE, *Judge*.

Filed Febr'y 16th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

78

Defendants' Bill of Exception No. 4.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

Be it remembered: That on the trial of the above entitled and numbered cause, upon its merits, the plaintiffs Felix Gross and Theresa Gross while testifying as witnesses for themselves, proposed and offered to prove by their own testimony, that frequently during his lifetime and during his employment in the service of the defendant company, as fireman, their son, Corley Gross, had declared to witnesses his purpose to contribute of his earnings to their support and maintenance as long as they, or either of them, should live.

The defendants, and each of them for itself, then and there objected to the introduction of such testimony for the reason that the

same was irrelevant and immaterial, involved hearsay, and was in the nature of self-serving declaration, and same was too remote and speculative as a basis or measure of damages in this cause; which objections were overruled by the Court and said testimony was admitted; and to this ruling of the Court, the defendants, and each of them, in open Court, duly excepted and now here tender this their bill of exception No. 4 and pray that same be allowed and approved by the Court as part of the record in this cause, and it is accordingly so ordered.

CHAS. E. ASHE, *Judge.*

Filed February 16th, 1909, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception No. 5.

(Filed Feb. 16, 1909.)

79 In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al.

Be it remembered: That upon the trial of the above entitled and numbered cause and during the hearing upon the merits, the plaintiffs offered and proposed to introduce in evidence the Fifth Direct Interrogatory propounded to the witness Henry P. Dart, and the answer of said witness thereto, which interrogatory, together with its answer reads as follows, to-wit:

"If in answer to the last preceding interrogatory you have stated that the right of action inquired about therein does exist and is recognized in the State of Louisiana, by virtue of a local statute or code, please give reference to the same and quote it at length, as part of your answer hereto.

"A. The local statute which governs actions for personal injury is as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language.

"Article 2315: Obligation to Repair Damage Caused by Wrongful Acts: Survivorship of Action: 'Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother of either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sus-

tained by them by the death of the parent or child, or husband or wife, as the case may be."

And thereupon the defendants, and each of them for itself, respectively, objected to the introduction of said question and answer as evidence in this case, on the following grounds: (1) That the proposed testimony was irrelevant and immaterial to any issue in the cause; and (2) that the statutory law mentioned and described in the answer and deposition of said witness and offered, was not admissible under the — plaintiffs not having alleged or declared upon the existence of such statute and law as a basis of action; and (3) and that the right of action, if any, created, or attempted to be created by the statute mentioned and described in said answer and deposition was so done or attempted by the legislature of Louisiana after the time of the enactment and approval by said legislature of the Act of 1878 creating the Louisiana Western Railroad Company, and that in so far as the action for injuries resulting in death is afforded by the amended Article 2315 mentioned in said answer and this right of action is sought to be declared upon and enforced against the defendants, or either of them, for the death of Miller and Gross on a railroad owned and operated in the State of Louisiana, it would impair the obligation of the charter contract and violate the immunities and exemptions stipulated in Section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, and that Article 2315 as amended by the Legislature of Louisiana in 1884, so as to give or attempt to give the right of action here asserted, would have the effect of impairing the obligation of the contract and would thus be violative of the provisions of the Constitution of the State of Louisiana and of the State of Texas, and of the United States of America.

Which objections on the part of the defendants and each of them, the court overruled, and thereupon permitted the proposed testimony to be read and introduced in evidence, and to this ruling of the Court the defendants and each of them, for itself, then and there in open Court duly excepted and now here tender this their joint and several bill of exception, and pray that same be certified and approved by the Court as part of the record in this cause; and it is accordingly so ordered.

CHAS. E. ASHE, *Judge*.

81 Filed Febr'y 16th, 1909. Henry Albrect, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception #6.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD CO. et al.

Be it remembered: That on the trial of the above entitled and numbered cause upon its merits, the plaintiffs offered in evidence the Sixth Direct Interrogatory propounded to the witness Henry P. Dart, and the following portions of the witness's answers thereto:

"If in answer to preceding interrogatories you have indicated the authority and basis (if any) upon which the Courts in the State of Louisiana recognize and award damages for injuries resulting from death, inflicted through the fault of another person, then please state what were the rules of law obtaining in the State of Louisiana on the date of the alleged injury, with reference to the measure of damages and elements of damage allowed for such injuries, to those entitled to the action."

"And in this connection state: (a) Whether the damages so allowed the surviving parents and the surviving wife and children, include compensation for the wounded feelings and affections of the survivors, or for deprivation of the society of the deceased; and in this connection make reference to any decisions or other authorities on this subject: and (b) state whether the fact that a deceased child for whose death action was brought by the parents has passed its majority, is a circumstance to be considered by the Judge or jury in connection with the measure or amount of damages that may

82 be awarded, and in this connection refer to any decision or other authority that may be convenient.

"A. The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the Courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code however contains nine articles on the general subject, which in Louisiana goes by the title of 'Offences & Quasi Offences' the Articles being 2315 (already cited) to 2324 (inclusive) which articles I append to this answer omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed before you. Of course these articles have been the subject of Judicial Construction and interpretation for many years and the decisions are, from my point of view, 'law or authority under the Code, and you will understand my answer.

"The Articles above mentioned are as follows:

Article 2316. Negligence, imprudence or want of Skill:

'Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.'

Article 2317. Liability for acts of others and things in our charge.

'We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.'

Article 2320. Acts of Servants, etc.:

'Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.'

83 In the above cases responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.'

Before the adoption of the amendment of 1884 these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. *Vredenburg vs. Behan* 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation.' *Van Amberg vs. R. R. Co.* 37 La. An. 652. *Eichorn vs. R. R. Co.* 112 La. 250; 36 S. R. 335.

Therefore as the law stood at the date of this accident and as it now stands, the survivor may recover.

(1) The damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see *Eichorn vs. R. R. Co.* 114 La. 718 et seq., 38 S. R. 526 *Payne vs. Lumber Company*, 117 La. 991, 42 So. Rep. 475:

Dobyns vs. R. R. 119 La. 82, 43 So. Rep. 934.

(3) To these elements the Court has now added recovery for mental suffering of the survivor. See *Stewart vs. R. R.* 112 La. 767; 33 So. Rep. 676 as applied in *Graham vs. Telegraph Company* 109 La. 1070, 34 So. Rep. 91; *Parker vs. Lumber Co.* 115 La. 463, 39 So. Rep. 445 and note the qualification in *Brinkman vs. Oil Co.* 118 La. 846, 43 So. Rep. 458.

(4) Vindictive or punitive damages are not permitted in actions for personal injury against a corporation. *McGary vs. City*, 81 12 Rob. (La. Reports) 675; *McFee vs. R. R. Co.* 42 La. An. 790. *Patterson vs. R. R. Co.* 110 La. 797, 34 So. Rep. 782 and *Parkerson case* 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident.

Huberwald vs. R. R. Co. 50 La. An. 477, 23 So. Rep. 474. In Eichorn vs. New Orleans & Carrollton R. R. Co. 114 La. 712, 38 So. Rep. 529-531, you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached majority since then. The age of majority of Louisiana is 21 years. Where the action runs in favor of minors the damages are apportioned according to their respective majorities. See Eichorn's case 114 La. at p. 726.

(6) Children under the code of Louisiana, Article 229 'are bound to maintain their father and mother and other ascendants who are in need,' on the other hand the child, under Article 216 of the Civil Code remains under the authority of his parents until his majority;

There is also further provision, Articles 230-231, defining alimony as 'what is necessary for the nourishment, lodging and support of the person who claims it.'

In Myhan vs. Electric Co. 41 La. An. 969, the parents claimed for the death of a son eighteen years. The Court, referring to his duty said: 'the probability is that as he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard to his personal wants and necessities etc.'

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question Six, subsection (b) must be answered in the affirmative. In the Myhan case the Court 85 allowed \$2000.00 for the death, as a sum that would relieve the parents 'for a while to some extent from the immediate consequences attending the severe injury inflicted on them.'

The Supreme Court of Louisiana has decided that the restrictive clause of Article 2320 has been read out of the Article as the result of the Jurisprudence of this State.

As to this it is said in Weaver vs. Goulden, 116 La. 473 40 So. So. Rep. 798, as follows: 'As to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents.' And further it is said: 'Even as between individuals this restriction has been virtually ignored in the latter decisions of this Court.'

And to the proposed introduction of said question and answer and testimony, the defendants, and each of them, objected, for the reasons

(1) that the proposed evidence was irrelevant and immaterial.

(2) that the statutory right of action and the rules of law pertaining thereto as applicable to such injury and death, occurring in Louisiana, were nowhere alleged or declared upon as a basis of action by plaintiffs in their pleading, and hence the evidence proposed was not admissible under the plaintiffs' pleading; and (3) that the right of action created or attempted to be created by the

Louisiana Statute of 1884, in behalf of the designated surviving relatives for the injury resulting in the death of deceased, was so created or attempted to be created by the Louisiana Legislature in the year, 1884, and long after the passage of the Act of 1878 incorporating the Louisiana Western Railroad Company in said state, and granting it the certain immunities and exemptions from liability expressed in section 17 of said incorporating act, and after the said railroad company had acted in good faith in accepting the terms and provisions of said incorporating Act and acquiring vested rights thereunder, and that the effect of said amended Act of 1884, creating or attempting to create such right of action as plaintiffs are asserting herein as against the defendants, tends to impair and would impair, if enforced, the obligation of contract and deprive defendants of vested rights under their contract, in violation of the constitution of the United States and of the State of Louisiana and of the State of Texas:

These objections were overruled by the Court and plaintiffs were permitted to read and introduce said interrogatory and answer above quoted, as evidence in this case, and to this ruling of the Court the defendants and each of them then and there in open Court duly excepted and now here tender this their joint and several bill of exception No. 6, and pray that same be approved and certified by the Court as part of the record in this cause; and it is accordingly so ordered.

CHAS. E. ASHE, *Judge*.

Filed Feb'y 16th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception No. 7.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That on the trial of the above entitled and numbered cause upon its merits, the plaintiffs offered and proposed to read and introduce in evidence certain answers and portions of answers of the witness Henry P. Dart, to direct and cross interrogatories, as follows:

In answer to the Seventh Direct Interrogatory the witness testified:

"On the 1st of June, 1905, and for many years prior thereto the statutory authority for an action for personal injuries by the servant

against the master was the Articles 2317 to 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter." In answer to the Second Cross Interrogatory the witness says:

"Substantially the word 'fault' as a rule means under our law such active or passive conduct as has brought about the injury in question."

To the Third Cross Interrogatory he answers:

"I think the aim of our statute is to give pecuniary compensation for the loss sustained in such cases."

In answer to the Fourth Cross Interrogatory, the witness says:

"I have read the case of Cox, 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original."

In answer to the Sixth Cross Interrogatory the witness answers as follows:

"The Statutory Law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish to employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work and reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and there existing, and the knowledge of the employee of the same, and a failure to do so would constitute 'fault' within the meaning of this statute and such fault would be negligence within the meaning of the law. Woods vs. Jones 34 La. An. 1086—Gusman vs. Caffery Co.

49 La. An. p. 1264 22 So. Rep. 742, Henry vs. Lumber Co. 48 88 La. An. 950; 20 So. Rep. 221; Smith vs. Sellars, 40 La. An. 527 — So. Rep. —.

In answer to the Seventh Cross Interrogatory the witness answers as follows:

"I refer to cases cited and also to Van Amberg vs. R. R. Co. 37 La. An. 650—Wallis vs. Morgan's La. & T. R. R. Co. 38 La. An. 156—Gusman vs. Caffery Co. 49 La. An. 1269—70 22 So. Rep. 742—Jones vs. Ry. Co. 51 La. An. 1247—Merchant vs. Price Woods Co. 107 La. 563—Fuller vs. Tremont Co. 114 La. 267, 38 So. Rep. 164—Harris vs. Lumber Co. 115 La. 977 40 So. Rep. 374."

In answer to the 8th Cross Interrogatory the witness answers as follows:

"I think that the case of Roff vs. Summit Lumber Co. 44 So. Rep. 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of Bell vs. Lumber Company 107 La. 731, 31 So. Rep. 994—Stucke's case 23 So. Rep. 342—Merritt's case 35 So. Rep. 499, Evans case 35 So. Rep. 736 and Duncan vs. R. R. 51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject matter."

Thereupon the defendants objected to the said answers and depositions of the witness, above quoted and objected to the introduction thereof, on the following grounds: (1) that said proposed testimony was immaterial and irrelevant; and (2) that the statutes

and rules of law and other matters testified to in said depositions and here objected to are not alleged or declared upon as a basis of action by plaintiffs in their pleading herein, and are not admissible under their pleading, as a basis for recovery; and (3) that in so far as said evidence tends to establish the creation and existence in the State of Louisiana of a statutory right of action in plaintiffs for injuries causing the death of Miller and Gross, such statutes having been enacted in the year 1884, and subsequently to the passage and approval by the Louisiana Legislature of the Special Act of 1878, incorporating the Louisiana Western Railroad Company, and giving it, as part of its charter rights, the exemptions and immunities stipulated in section 17 of said incorporating Act, which was accepted and acted upon by it in good faith, would have the effect of impairing the obligation of the contract and to deprive defendant of its vested rights thereunder, contrary to the constitutional provisions of the United States of America and of the State of Louisiana and the State of Texas.

And the Court overrules said objections, to which ruling of the Court the defendants, and each of them, for itself, then and there duly excepted and now tender this their joint and several bill of exception No. 7 and pray that same may be allowed and approved and certified by the Court; and it is accordingly so ordered.

CHAS. E. ASHE, *Judge*.

Filed Febr'y 16th, 1909, Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

Defendants' Bill of Exception No. 8.

(Filed Feb. 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered that at the conclusion of the trial of the above entitled and numbered cause on its merits the Court having announced and rendered his judgment in favor of plaintiffs and against defendants therein, the defendants thereupon requested the trial judge to prepare and submit his findings and conclusions of fact and law upon which said judgment was predicated, and thereupon the trial judge did prepare and cause to be filed herein, on January 30th, 1909, the findings and conclusions of fact and law upon which he based his said judgment; and thereupon in open Court the defendants Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and each of them

excepted to each and every portion and paragraph of the said findings of fact and conclusions of law, which findings and conclusions as set forth and signed by the said judge and filed herein are hereby referred to and made parts hereof; and the defendants and each of them caused said exceptions to be entered in the final judgment record and now here tender this their joint and several bill of exception No. 8, and pray that same be allowed, approved and certified by the Court as part of the record in this cause, and it is accordingly so ordered.

CHAS. E. ASHE,

Judge 11th Judicial District Court, Harris County, Texas.

Filed Feb'y 16th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer.

Appeal Bond.

(Filed Febr'y 19, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD CO. et al.

Whereas, in the above entitled and numbered cause pending in the District Court of Harris County, Texas, for the 11th Judicial District during a regular term of said Court on, to-wit: January 30th, A. D. 1909, the plaintiffs, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, recovered a judgment against the defendants, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, for the aggregate sum of Sixteen Thousand Dollars, together with interest from date of judgment and costs of suit, the said recovery being apportioned among the said plaintiffs as follows:

| | |
|---------------------------------------|--------------|
| To Fannie L. Miller, the sum of..... | \$8,000.00 |
| To George W. Miller, the sum of..... | 2,000.00 |
| To William D. Miller, the sum of..... | 2,500.00 and |
| To Dorace H. Miller, the sum of..... | 3,500.00 |

And whereas the said defendants, Texas & New Orleans Railroad Company, and Louisiana Western Railroad Company, have appealed from said judgment to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Now, therefore, know all men by these presents that we, the said Texas & New Orleans Railroad Company, and Louisiana Western

Railroad Company, as principal and The United States Fidelity & Guaranty Company, as sureties, acknowledge ourselves bound to pay unto the said plaintiffs Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, appellees, the sum of Thirty Seven Thousand Dollars (\$37,000.00). Conditioned that said appellants Texas & New Orleans Railroad Company, and Louisiana Western Railroad Company, shall prosecute their appeal with effect and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against them.

In testimony of which witness our hands this the 19th day of February, A. D. 1909.

TEXAS & NEW ORLEANS RAILROAD COMPANY &
LOUISIANA WESTERN RAILROAD COMPANY.

Principals,

[SEAL.] By LANE, JACKSON, KELLEY & WOLTERS,

Attorneys,

THE UNITED STATES FIDELITY & GUARANTY COMPANY.

By E. A. ROBBINS &
SEWALL MYER.

Its Attorneys in Fact.

92 The above and foregoing appeal bond is accepted and approved and filed this 19th day of February, A. D. 1909.

HENRY ALBRECHT,

Clerk District Court of Harris County, Texas.

T. W. BROWNE, *Deputy.*

Filed Febr'y 19th, 1909. Henry Albrecht, C. D. C. H. C. by T. W. Browne, Deputy.

Assignment of Errors.

(Filed Febr'y 16th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District,

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Now in the above entitled and numbered cause comes the defendant, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and having excepted to the Judgment

of the Court and the conclusions of fact and law entered against them by the Judge of said Court, on to-wit: the 30th day of January, 1909, and having taken appeal from said judgment, present and submit this their joint and several assignment of the errors committed by said Court upon and in connection with the trial of this cause and the judgment and findings and conclusions therein entered, to-wit:

1.

That the Court erred in overruling the pleas to the jurisdiction and in abatement of each of said defendants as set forth in section II of the Original Answer of the Louisiana Western Railroad Company and Section 1 of the First Amended Original Answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in the defendants' Bill of Exception No. 1 which is hereby referred to and made part hereof.

93

2.

That the Court erred in overruling and refusing to sustain the general demurrer of each of the said defendants, as set forth in their respective answers on file herein.

3.

That the Court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in overruling and refusing to sustain the special demurrers of said defendants, set forth and asserted in Section IV and Section III of the Original Answer and the First Amended Original Answer of said defendants, respectively.

4.

That the Court erred to the prejudice of each of the defendants, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, in and by its judgment and decree and in its conclusions of fact and law, for the reason that there was a fatal variance between the plaintiffs' allegations and the facts proven, in this: that while evidence was introduced by and on behalf of plaintiffs, over the objection of defendants, showing the existence of the statutory laws and codes of the state of Louisiana and the construction thereof by the Courts of said State, upon the existence and effect of which the judgment, if any, in favor of plaintiffs must stand, yet there was no pleading on the part of the plaintiffs as to the existence or the effect of such statutes and other laws of the State of Louisiana to justify the admission of the evidence thereof, or to support a judgment on such theory, and therefore the pleadings of plaintiffs do not justify or support the judgment as rendered on the evidence.

5.

That the Court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in its judgment and decree against them, and

94 in the conclusions of fact and law upon which said judgment is based, in this: that under and by virtue of section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of William Miller, and such immunity and exemption from liability was a matter of contract between the state of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé and the Act of the Legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State so as to give, or attempt to give and create the right of action asserted by plaintiffs in this cause, would have and did have the effect, if enforceable, of impairing the obligation of such contract and thus would be and was violative of the provisions of the Constitution of the State of Louisiana and of the State of Texas and of the United States of America, and especially of Section 10 of Art. I of the constitution of the United States of America.

6.

That the Court erred to the prejudice of the said defendants and each of them, in admitting the testimony of the witness H. P. Dart, over the objections of the defendants, as set forth and for the reasons fully stated in defendants' bill of exception No. 5, referred to and made part hereof.

7.

That the Court erred in admitting the depositions of H. P. Dart, over the objection of the said defendants, as set forth and for the reasons stated in the defendants' Bill of Exception No. 6, which bill is hereby referred to and made part hereof.

8.

95 That the Court erred to the prejudice of each of the said defendants in admitting, over their objections, the depositions of the witness H. P. Dart, which are set forth in defendants' Bill of Exception No. 7 and for the reasons therein stated, which bill is hereby referred to and made part hereof.

9.

That the Court erred to the prejudice of each of the defendant, The Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in its judgment and decree against them and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston in said Harris County, Texas, to Lafayette in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employees of the other as the business or convenience required, and each hired for and discharged employés in the said joint business and the employees hired by one were required to perform and did perform serv-

ices on the railway of the other; that such employes made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways as a continuous route and were partners in such business, sharing in the profits and losses thereof."

And the Court erred in concluding as matter of law that the Texas & New Orleans Railroad Company was jointly liable with the Louisiana Western Railroad Company for the injury and death of the said William Miller, and in rendering joint and several judgment against the two defendants accordingly.

10.

That the Court erred to the prejudice of each of the said defendants in rendering its said judgment against them, and especially in that portion of its conclusions of law and fact, being paragraph 2 thereof, to the effect and in substance as follows: that "the employes operating trains over the said railway relied upon the companies to keep the fences in repair and the gates closed to the end that they might not be exposed to the peril of injury or death by the derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track"; and in finding that the defendants failed to use proper care to keep the gates closed, and that such failure was the proximate cause of the injury and death of William Miller for which the defendants were legally liable, and so rendering judgment against these defendants.

11.

That the Court erred to the prejudice of both the defendants by rendering its judgment against them, and in its conclusions of fact and law upon which said judgment was based, and especially in that portion of its said conclusions of fact and law being paragraph numbered 4, reading as follows, to-wit:

"I, find that some hours previous to the derailment of Miller's locomotive that another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right of way within a short distance of a gate in the right of way fence, and that several hours prior to the derailment of a number of cattle entered the right of way through the said gate and were seen by employees of defendants, in charge of one of the defendants' East bound trains, gathered about the dead one, holding a 'ceremony' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right of way by the dead one; and I find that defendants knew or would have known by the exercise of ordinary care of the presence of the dead animal upon the right of way and knew or would have known by the exercise of such care that if the gate was open, that cattle would probably be attracted therein by the dead one or would enter therein of their own volition, and knew of the

97 presence of the cattle which were gathered about the dead one in time to have notified Miller of that fact and in time to have had the said cattle removed from the right of way, and I find that it was the duty of defendants and the section — upon which the said cattle were, to have removed said cattle, or failing so to do that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right of way and that they could have notified him, and in that case he could have been on the look-out for said cattle and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way under the circumstances and in failing to remove them from the right of way before the accident and in not giving the said Miller notice of their presence upon the right of way, and that such negligence was the proximate cause of the death of Miller and that plaintiffs were actually damaged by his death in the sum hereafter stated."

And the Court erred in this connection in concluding, as matter of law, that the facts so found, as above quoted, constituted actionable negligence on the part of the defendants, or either of them, and in accordingly rendering judgment against them on such grounds, for the following reasons, to-wit: (1) That there was no pleading in the plaintiffs' petition charging actionable negligence on the part of the defendants, or either of them in leaving the dead animal near the track, whereby other live animals were attracted on to the right of way and thereby the latter became an obstruction causing the wreck, the allegation in the petition, on the contrary, being that the dead or wounded animal itself got upon or was left upon or near the track and itself became an obstruction causing the wreck, and there being no evidence to support this latter allegation as actually made in the pleading; (2) that under the undisputed facts in the case there was no testimony or circumstance of probative

98 force amounting to any evidence that the animal which was encountered and caused the wreck and the death of William Miller was one of those animals actually observed inside the right of way fence and near the track by the fireman Reese when he was passing the point of the wreck seven or eight hours prior to its occurrence; and hence the necessary casual relation between the failure to remove the cattle seen by Reese or notify Miller of their presence at this point, and the wreck itself, is not established by any evidence in the record so as to support and sustain the judgment rendered.

12.

That the Court erred to the prejudice of each of the said defendants in its judgment and decree against them, and in its conclusions of fact and law upon which the judgment is based as set forth in paragraph numbered 5 of such findings and conclusions reading as follows:

"I find that there is a substantial similarity between the laws of

Louisiana and the laws of Texas giving right of action for injuries resulting in death, and under the law of Louisiana that Miller was not a fellow servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death." For the reasons (1) that there is no pleading on the part of the plaintiffs to justify such finding as a basis for judgment in this cause; and (2) that under the undisputed facts in this case, in so far as same were admissible in evidence to support the plaintiffs' pleading, the injury and death of Miller resulted from risks and dangers of the service open and known to him and of which he assumed the risk.

13.

That the Court erred to the prejudice of both the defendants in rendering the judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this: that according to the undisputed evidence the deceased was a man of considerable knowledge and experience as a locomotive engineer, being
99 thoroughly familiar with the line of road over which he was operating the engine on this occasion, being familiar with the method of fencing and maintaining gates along the right of way and enclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track and within the enclosed right of way at such points as that at which this wreck occurred, and that under the undisputed facts and according to the law applicable thereto the deceased, William Miller, had assumed the risk of the accident and injury, and neither of the defendants is liable therefor to the plaintiffs.

14.

That the Court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting over the objection of said defendant, the printed Rule No. 334 offered and read in evidence, for the reason that same was irrelevant and immaterial to any issue in the case so far as said defendant was concerned and was a rule for which so far as the evidence indicated, the defendant was in no wise responsible, all of which actions so complained of are fully set forth in defendants' Bill of Exception No. 2 which is hereby referred to and made part hereof.

15.

That the Court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting in evidence, over its objection, the printed rule No. 420, set forth in the defendants' Bill of Exception No. 3, and for the reasons in said bill of exception set forth, to the effect that the said printed rule was irrelevant and immaterial to any issue in the case involving the said defendant and was not shown to be a rule authorized or promulgated by said defendant or for which it was in any wise responsible, and said Bill of Exception No. 3 is hereby referred to and made part hereof.

16.

That the Court erred to the prejudice of the defendant Texas & New Orleans Railroad Company, in rendering judgment against it jointly with its co-defendant for the reasons: (1) that at the time of the wreck and injury of the said William T. Miller he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor -as then and there an employé of the said defendant: (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of respondeat superior: (3) that the rules and regulations relied upon in the pleading and introduced in evidence and which are alleged to have been negligently violated, thus causing the injury and death of Miller, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

17.

That the Court erred in its judgment and decree and in that portion of its conclusions of fact and law, being paragraph numbered 2 to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employés operating the trains relied upon the defendant companies to keep the said gates closed so as not to expose them to peril of injury or death by derailment, and that the failure of the defendants to keep such gates closed was negligence on their part proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that according to the facts of the case and under the law applicable thereto, the said gates had been placed in the right of way fence for the use and benefit of third parties, and the Louisiana Western Railroad Company acknowledged (recognized) the duty of said third parties to keep such gates closed and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of the defendants, or either of them, rendering them liable for the alleged negligence and death.

18.

That the Court erred to the prejudice of each of said defendants in its judgment and decree against them and in its conclusions of fact and law, as found, upon which said judgment is based, for the reason that according to the undisputed facts in this case there were such dissimilarities between the laws of the State of Louisiana, in which the accident and injury occurred, and the laws of the State of Texas, in which this suit was prosecuted, as to render it impracticable and contrary to the policy of the law and the comity between

the two states for the Courts of Texas to take cognizance of and undertake to determine the controversies involved and to administer and apply the laws of Louisiana, and that such dissimilarities and inconsistencies and conflicts between the laws consisted, according to the evidence, especially of the following features and particulars, to-wit:

(1) That the laws of the State of Louisiana in cases in which damages were allowed to parents for injuries resulting in the death of a child, and in which damages were allowed to the children and surviving wife for injuries resulting in the death of a husband, included and embraced in and as part thereof (a) the damages decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time that intervened between the accident and his death, for his disfigurement, and for the expenses of his illness: (b) the loss or deprivation of the decedent's society and his aid and support, also the expenses of his death and burial; (c) damages for mental suffering of the survivors.

(2) That at the time of the occurrences of said injury and death, according to the laws of Louisiana applicable to the controversies involved in this cause, the engineer and foremen (Miller and 102 Gross) were fellow servants, so that the defendant companies were not liable under said law for the death of either of them, in so far as it was the result of negligence on the part of the other.

(3) That according to the provisions of Act No. 21 of the General Assembly of the State of Louisiana for the year, 1878, which created the corporation of the Louisiana Western Railroad Company, the defendants were exempt from liability for the alleged injuries resulting in the death of Miller and Gross.

(4) That at the time of the alleged occurrence in the State of Louisiana and according to the laws of Louisiana applicable to the issues and controversies in this case, the trial and appellate judges had greater power and control over the verdicts of juries than the Judges of the Courts of the State of Texas had or have, and according to the laws of the State of Louisiana nine members of the jury of twelve had the power to render a verdict.

Wherefore defendants aver and submit that the pleas setting up such facts and conditions and dissimilarities of law in bar of the said actions were supported by the evidence and should have been sustained, and the Court should have dismissed said cause or rendered judgment in favor of defendants.

19.

That the Court erred in rendering its judgment and decree herein for the aggregate sum of Sixteen Thousand Dollars, and that said amount is exorbitant and excessive and beyond the amount which the plaintiffs are legally entitled to under the evidence, and that such judgment is the result of the Court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence over the objection of defendants, and that it was incompetent and against the policies of the Courts of the State

of Texas and against the spirit of comity between two several states
 for this Court to allow damages herein according to measures
 103 of damage existing in the State of Louisiana but which are
 not recognized or permitted according to the laws of the
 State of Texas in such cases.

A. L. JACKSON,

LANE, JACKSON, KELLEY & WOLTERS,

*Attorneys for Defendants and Appellants,
 Louisiana Western Railroad Company,
 Texas & New Orleans Railroad Company.*

Filed March 16th, 1909, Henry Albrecht, C. D. C. H. C. By
 T. W. Browne, Deputy.

Cost Bill.

THE STATE OF TEXAS:

No. 37282.

FANNIE L. MILLER et al., Plaintiffs,

vs.

TEXAS & NEW ORLEANS RAILROAD Co. et al., Defendants.

To Officers of Court, Dr.

Clerk's Costs:

| | |
|----------------------------|---------|
| Docketing | \$.20 |
| Filing | 2.25 |
| Assessing Damages | .50 |
| Entering Appearances | .30 |
| Citations | 1.75 |
| Entering Orders | 2.50 |
| Entering Judgments | 2.00 |
| Swearing witness | .50 |
| Approving Bond | 3.00 |
| Transcript | 71.00 |
| Filing Brief & Cert. | .90 |
| Taxing Costs | .25 |
| | <hr/> |
| | \$85.15 |

Sheriff's Costs:

| | |
|--------------------------|--------|
| Serving Citations | \$1.50 |
| Jury Fees | .50 |
| Mileage | .25 |
| | <hr/> |
| Total | \$2.25 |
| Stenographer's Fee | 3.00 |

104

Recapitulation.

| | |
|------------------------------|---------|
| Clerk | \$85.15 |
| Sheriff | 2.25 |
| Stenographer's Fee | 3.00 |
| | <hr/> |
| | \$90.40 |
| Paid by Def't Jan. 6/06..... | 20.60 |
| | <hr/> |
| Balance Due | \$69.80 |

STATE OF TEXAS,
Harris County:

I, Henry Albrecht, Clerk District Court in and for Harris County, do hereby certify that the above is a correct bill of all costs incurred in the above numbered and entitled suit up to this date.

In witness whereof, I hereunto affix my hand and seal of the Court at office in Houston, this 30th day of March, 1909.

[SEAL.]

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By T. W. BROWNE, *Deputy.*

Clerk's Certificate.

THE STATE OF TEXAS,
County of Harris:

I, Henry Albrecht, Clerk of the District Court of Harris County, Texas, do hereby certify that the above and foregoing one hundred and eighteen pages is a true and correct transcript of all proceedings had in Cause No. 37,282, entitled Fannie Miller, et al. vs. Texas & New Orleans Railroad Company, et al., as the same appears
105 on file and of record in my office, with the exception of statement of facts in said cause.

Given under my hand and seal of said Court at office in Houston, Texas, this the 31st day of March, 1909.

[SEAL.]

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By T. W. BROWNE, *Deputy.*

Statement of Facts.

(Filed in Court of Civil Appeals Apr. 21, 1909. H. L. Garrett,
Clerk.)

In the District Court of Harris County, Texas, 11th Judicial
District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That upon the trial of the above entitled and numbered cause, before the Honorable Charles E. Ashe, Judge of the 11th Judicial District Court, which occurred on the 30th day of January, 1909, the following facts were adduced in evidence, on the merits, to-wit:

WILLIAM REESE, a witness for plaintiffs, having been duly sworn, testified as follows:

My name is William Reese. I reside in Paris, Texas, and have worked for the Texas & New Orleans Railroad Company as a locomotive fireman, both on passenger and freight runs, for a period of 5 years, 8 months and 13 days, during which time my home was in Houston, Texas.

I knew William T. Miller, the deceased, who was a locomotive engineer on the T. & N. O. and also on the Louisiana Western Railway. I remember about the time Mr. Miller was killed and went over that portion of the road upon which his train was wrecked on the evening of the day before the wreck occurred. I was fireman drawing the regular passenger train known as "Second No. 5," running from the direction of New Orleans to Houston, and my train passed Sulphur Mine somewhere in the evening, during daylight. Sulphur Mine is a station on the Louisiana Western Railway, located in the State of Louisiana, about 10 or 15 miles west of Lake Charles and about 27 miles east of Echo. Echo is located in Texas on the west side of the Sabine River. The train that I was on upon this occasion got into Echo very late in the evening; the train that Mr. Miller was on, going east, passed Echo somewhere about 11 o'clock at night.

I am familiar with the point at which this wreck occurred—about 3 miles west of Sulphur Mine. The right of way is enclosed with a fence along by that point. On the evening before this wreck, when I passed this point, I saw cattle within the right of way fence at this point and I saw a gate open, leading into the right of way at this point, as I passed on my engine. The cattle which I saw on this occasion were about 150 to 200 feet east of this gate. I saw four or five cattle in there, though I don't know exactly how many. I do not believe that prior to that time in running over the road as fire-

man drawing freight or passenger trains I had ever seen cattle within the right of way fence right at that point, nor do I remember ever seeing this gate open before that time.

When I passed on this evening, I saw one dead animal at this point, which looked like it had been killed. This dead cow was lying right close to the track and the other cattle which were alive seemed to be holding a kind of ceremony over the one that was dead there. I did not see any other cattle lying down next
107 to the track or close to the track beside the dead one. There were none of the cattle close around where the dead cow was that appeared to be crippled; their physical condition was perfect, so far as I know, excepting the one that was killed. The one that was killed was very close—3 or 4 feet—from the end of the ties, I suppose. I saw it as my train passed by and I could tell from looking at it that it was dead. It had not been dead long, though I did not feel of it and could not tell whether it was warm or cold, and as matter of fact could not say definitely how long that cow had been dead, but these other cattle were around there standing off looking at it.

When we got into Echo that night I did not, nor did my engineer, nor did anybody connected with my train, so far as I know, report the dead cow lying near the track near Sulphur Mine, nor other cattle being on the right of way. My regular engineer at that time was Lon Wilson, but he was not running the engine that evening. A man by the name of Clark, who is supposed to be the traveling engineer, was in the engine with me, and running it, when we passed the point of the wreck.

He (Clark) was in charge of the engine that evening. The traveling engineer (Clark) was supposed to instruct the engineers how to handle the engines—first one thing and another, pertaining to their business in general. He was over all the engineers, having authority over them. I told him (Clark) that cattle were on the right of way. He said nothing to amount to anything; I don't know that he said anything at all. I told him there was a dead cow lying down there; the cow had indications of having been struck by an engine, and apparently that is the way she had been killed. Traveling Engineer Clark rode in the engine to Echo.

There were two stations, Edgerly and Vinton, between Sulphur Mine and Echo, and we stopped at both of them, but he did not get off at either of these places to inform anybody that these cattle were on the right of way. Vinton and Edgerly were both tele-
108 graph stations. Clark did not notify anybody at Echo, connected with the company, that these cattle were on the right of way, so far as I know; I did not see him do it, and I know he did not get off of the engine at either of these places. Edgerly is about 4 or 5 miles from Sulphur Mine and we passed there before dark. Vinton is between Edgerly and Echo, about 4 or 5 miles from Edgerly, and both of them were telegraph stations, with telegraph operators at that time. Sulphur Mine, also, was a telegraph station and these cattle were about 3 miles west of Sulphur Mine, and we were going west.

Both the fireman and engineer were killed in this wreck.

There was a section at Sulphur Mine and the section gang made their headquarters there. Sulphur Mine Station was about $2\frac{1}{2}$ or 3 miles East of the point where the wreck occurred. We (Mr. Clark and I) with our engine, had passed Sulphur Mine at time we saw the cattle, and went on to Edgerly for our next stop, and then stopped at Vinton. The train that we were on comes into Houston, and did so at that time, along about 9 o'clock that night.

Mr. Miller was the engineer in charge of the East bound passenger train on that date, and I believe we met him that night at Amelia. The train he took out was known as the 7:20 train, No. 8. He was pulling No. 8, which left the City of Houston at 7:20 P. M. Amelia is 5 miles west of Beaumont. The engineer in charge of first section No. 5 coming west ahead of me was named Dobbins, and we passed Sulphur Mine — that occasion 10 minutes behind first section No. 5. When we got to Echo I met Dobbins and I told him (Dobbins) that I saw these cattle on the right of way up near Sulphur Mine and that I saw a cow that had been killed.

The train being drawn by Miller's locomotive was due at Sulphur Mine somewhere around 12 o'clock at night and I had passed
 109 *Sulphur Mine somewhere around 12 o'clock at night and I had passed* Sulphur Mine somewhere about between 5 and 6 in the evening while it was still daylight. This was the 1st of June, 1905. I came into Houston that night and heard of the wreck and the death of Miller the next morning. At that time my run was a regular passenger run between Houston and La Fayette. I worked for the T. & N. O. Railroad Company; was employed to work for the T. & N. O. and to run between Houston and La Fayette, that is, Houston, Texas, and La Fayette, Louisiana. The Southern Pacific Railroad Company, I suppose paid me. I drew my checks from the T. & N. O. My employment involved the necessity of working over the T. & N. O. and the Louisiana Western from Houston as far as La Fayette, La., and from La Fayette back to Houston over the same road. I was under W. S. Cox, Division Superintendent, and J. J. Ryan was master mechanic. Cox's headquarters were in Houston in the fifth ward. I got the engine that I fired upon from the round-house in the fifth ward at Houston. This engine did not stop at the terminus of the T. & N. O. at the Sabine River, but went on to La Fayette. The engines did not run by name, but by numbers. Some had L. W. on them; some, T. & N. O.; some G. H. & S. A.; and some M. L. & T. M. L. & T. means Morgan's Louisiana and Texas. And some had S. P. on them. These engines, indiscriminately, were used between Houston and La Fayette. The Louisiana Western is just a division of the company. The M. L. & T. division is from La Fayette to New Orleans. The first division of this S. P. system between Houston and New Orleans towards the east was T. & N. O. At the time of this injury this division extended to Echo. The next division started at Echo and went to La Fayette. This was the L. W.—was the Louisiana Western.

I suppose that Miller's run was the same as mine—from Houston to La Fayette. I met him over there frequently. My lay-off was

at Houston and at La Fayette. In going from Houston to La Fayette on passenger runs we got fuel for the engine at Houston and Lake Charles, and in coming back, at the same places.

110 La Fayette was the fuel supply and I got more at Lake Charles; and in going out from Houston we would get fuel at Houston and what we would get here would run us into Louisiana, and the fuel we would get at La Fayette would run us into Houston.

Mr. Cox was division superintendent between Houston and La Fayette at that time. We were not supposed to make reports to anybody else but Mr. Cox. My engineer reported to him. The whole train that I was with from Houston ran through to La Fayette with the same crew in charge. All the supplies necessary to run that train, including lubricating oil, fuel oil, and everything, were supplied right here in Houston; and over in Louisiana we got fuel at Lake Charles and fuel and supplies of all kinds at La Fayette.

On cross-examination the witness testified:

I was locomotive fireman, regularly drawing passenger trains between Houston and La Fayette for a couple of years and up to the time of retirement after the death of Miller. I continued after Miller's death until the 15th day of November, 1905, since which time I have not been employed by the Texas & New Orleans Railroad Company, nor operated on that line. I have no full or detailed knowledge as to the arrangements between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, nor personal knowledge of such matters. The only knowledge I have in this respect is from being employed by and working for them. I do not know, personally, how their affairs were managed in general.

I stated on direct examination that I got my pay from the Texas & New Orleans Railroad Company, but it is a fact that after a certain time, somewhere in 1904, they cut the division at Echo, and since the year 1904 and during the year 1905, and up to the time I quit the service, I got pay for my services on the Louisiana Western

111 Railroad from the Louisiana Western Railroad Company and got a separate check for this service and signed for it and collected it; and got a separate check from the Texas & New Orleans Railroad Company for services this side of the Sabine River and extending from that point to Houston. So far as I observed, the engineers and firemen that worked on this same run have gotten their pay in the same manner as I did, since 1904. Sometimes for convenience I would receive my checks from the Louisiana Western Railway Company at Houston, if I did not happen to be out in Louisiana,—that was a matter of convenience. During the time that I ran as a fireman over the Louisiana Western Railroad I do not remember to have seen cattle inside of the right of way at the point of this wreck. They might have been there at nights or even in the day-time, without my noticing them, and they might have been in there frequently at intervals when others were passing over the line, without my seeing them.

When I passed by the point at which the wreck afterwards occurred, I saw one head of stock dead and the others seemed to be

ing at it. I am familiar with the private crossings equipped with gates on the road in Louisiana. I don't remember whether there were any of these private crossings between Sulphur Mine and the state line of Louisiana and Texas, excepting this one, or not, but there is quite a number of them east of Sulphur Mine and between Sulphur Mine and La Fayette, Louisiana.

During the time that I was working there over the Louisiana Western Railroad, and up to the time of the death of Mr. Miller, the engineer that I was on several times struck stock between the state line of Louisiana and Texas and La Fayette, La., but never at this particular point of the wreck. Several times during that period and between those points, we had stock accidents, but this was generally on public crossings or station grounds, where the right of way was fenced. I do not remember to have had any accidents inside the right of way fence. I did not have anything to do with the making of stock reports, but the engineer had blanks supplied for this purpose and would make out a report of stock injured or killed. This was the custom and practice of the service; the engineer would turn in these stock reports to the master mechanic.

W. S. Cox is the man who employed me. After a certain time, beginning with the year 1904, as above stated, I received pay from the T. & N. O. Railroad company by its checks for the service performed in the State of Texas, and from the Louisiana Western Railroad Company for the services performed in Louisiana, but they never did, during the time of my service, stop the passenger trains on the Texas and Louisiana line except during the yellow fever in 1905, and did so at this time on account of the quarantine, but during the term of my employment the freight crew never went anywhere other than the state line.

I know nothing about the paper division of money in the way of checks. The passenger trains coming from La Fayette, towards Houston did not change crews at the state line except during the yellow fever, nor alter their arrangements as to fuel oil and other supplies above stated by me.

They had the right of way fenced up in Louisiana to keep cattle from getting on the track, I suppose. They were pretty strict generally in keeping them in repair. The fences used were barbed wire fences, with 5 or 6 wires. They were supposed to be sufficient to keep cattle. The fences had gates in them which were sufficient to let cattle if they were not left open. My idea is that the stock which got into the right of way fence came through open gates. These gates were put in the right of way fence as private crossings, so that outside and private people who owned farms on either side might go across. These gates were not put in there for the use of the railroad people, but for the private people living on either side.

They owned big farms on either side and if they wanted to go to the other side of the right of way they would open these gates and go through the private crossing. These gates were in the right of way fence and when closed constituted part of the line of fence of the railroad company.

I think that on the occasion when I passed and saw these cattle it was about the only time I ever saw this gate open. I saw no keeper at this gate. I made these trips over this portion of the road about 21 or 22 days a month during a period of about 5½ years.

At the time when Mr. Miller was killed the freight engines from Houston stopped at Echo. That grew out of the fact that the freight schedules were slower than the passengers. They used the same engines all the time on the passengers. Passenger engines went from Houston to New Orleans and did not stop at La Fayette. But the crews on the freight trains stopped at Echo and another crew would take charge of the freight trains at Echo and go through to La Fayette. The engineer, fireman and other members of the train crew on freights would change at Echo at the time when Mr. Miller was killed.

On recross-examination he testified:

It is a fact from my experience as a railroad man that the flat cars, stock cars, and box cars of various railroad companies are frequently off the lines of those companies that own them, and frequently, for example, the cars of the T. & N. O. Railroad Company are beyond the State of Texas and on the lines of other companies and upon the railroads of other companies that are in no way connected with the Texas & New Orleans Railroad Company. This is — result of ordinary traffic, and I suppose the railroad companies have a process and method of accounting for these things and charging them up against each other so as to bring about a final adjustment. I do not know whether the Louisiana Western Railway

Company owned any rolling stock at all outside of her 114 engines. Their line runs from Sabine River, or Echo, only to La Fayette, as I understand. I saw lots of the cars marked L. W., and saw them at the time of Miller's death. At and prior to the time of Miller's death the same engines would be run from Houston, Texas, to La Fayette, Louisiana, and prior to and up to that time they would use the fuel and other supplies gotten in one state to run the engine into the other.

It was here agreed, as a fact, that William T. Miller, deceased, was on the locomotive engine which was drawing passenger train No. 8, going east, on the occasion of the alleged wreck; and that Corley Gross was the fireman on said engine; that this engine was derailed at a point west of Sulphur Mine, in the State of Louisiana, on the 1st day of June, 1905, and that William T. Miller and Corley Gross received injuries in said wreck which resulted in their deaths, and that such derailment and wreck occurred on the railroad of the Louisiana Western Railroad Company, one of the defendants in this case.

JOHN B. LONG, having been duly sworn as a witness for plaintiffs, testified as follows:

I was a passenger on passenger train No. 8 on June 1st, 1905, going from Houston to New Orleans, when a wreck occurred and the engine left the track west of and near Sulphur Mine, in the state of Louisiana. This point was about 2 miles west of Sulphur Mine

station. William T. Miller was the engineer pulling the train and Corley Gross was the fireman. I was in the rear sleeper, occupying berth No. 10, and had gone to bed.

My attention was first called to the fact of the wreck by some one passing through the sleeper, calling out that we were in a wreck and that the engine had turned over. Something to that effect.

I immediately got up and I pulled my vest out from under 115 the pillow to see what time it was, and it was 11:45 p. m. I

do not remember exactly what time the train left Houston that night. I got up immediately and partly dressed and walked through the head sleeper—I was in the rear sleeper—and walked through the head sleeper and through the 2 coaches and to the front end of the first car, which was against the express or baggage car, and seemed to have *kareened* towards the south; and I could not get out of that door, so I turned back and walked to the platform between the first and second coach, and I got out on the south side; and in endeavoring to get to the front end I was stopped on account of the coaches extending towards the slough or swamp there, full of water, and I then turned back and crossed back over the platform and in going along the north side, when I got up about half way between the front of the rear end of the second coach, I was crawling on my hands and knees, and put my hands on this warm animal that was lying on the track directly under the coach. It was dead and had been dragged some distance from the west, going east, and it was lying then north on top of what was the original road bed; it was warm and was a large animal. I was there where the animal had been dragged on the gravel, where the animal had been dragged in some manner under the engine and coaches.

I saw Mr. Miller and when I saw him he was still living; he was walking with the assistance of some of the passengers; they were taking him back, and as well as I can remember, he was about in the front end of the sleeping car, where the long seat is. Fireman Gross, also was still living. I understand that they both died shortly afterwards. When I saw Mr. Miller he appeared to be suffering some—not a great deal, but seemed to be very buoyant. He was being assisted by somebody whom I did not know, and I did not know how badly he was hurt.

Mr. Gross, the fireman, came along first; he was walking by himself, and I asked him,—not knowing who he was, not know- 116 ing whether he was the fireman or engineer,—I asked him if I could assist him, and he said something about getting the engineer, or looking for the engineer, or something to that effect. I never heard either one of them say what they had run over, and I heard neither one of them say anything about being scalded or burned, or what they were suffering from; nor did I ask them.

On cross-examination the witness testified:

We stayed there at the wreck until about daylight. The relief train came a little before we left, and I understand it took these men away.

I did afterwards observe another animal there in the vicinity of

the wreck besides the large one I heretofore mentioned. After the engineer and fireman were placed on the train I crossed over on the south side and walked west. I crossed over on the platform of the passenger coach, to the south side, and walked west and when I got about 100 feet, or probably 125 feet, from where this animal was lying and partly under the coach on the south side of the track, I found a large yearling that was badly bloated and cold, lying some 7 or 8 or 10 feet from the track on the south side, and it had been dead apparently 36 to 48 hours; it was bloated, and was probably 10 or 12 feet, or a little more, from the south side of the track. There was no wreckage about it. It had been struck by a west bound train, and I say it had been struck by a west bound train from the posture the animal was lying in, and also the ground showed it had been that way. This yearling was somewhere about on the south side of the track where the rear end of the rear sleeper, or the last car of the train stood. The cars that were by the yearling were still on the track; all the coaches, both sleepers, the first class and a part of the second class coach, were on their trucks; they were on the rails, the head coach was not on the rails, but the second

117 coach from it was on the rails, I think the rear trucks, and the other cars were all on the track, including the two sleepers. I suppose it was a distance of 200 or 250 feet from the location of this yearling up eastward to the wreckage. There was no indication that any portion of this train had come in contact with the yearling; it could not have been so; the yearling was lying down about 15 feet from the end of the ties on the south side of the track.

I am connected with the Southern Pacific Company, in the position of inspector or chief officer of the detective department.

Mrs. FANNIE L. MILLER, the plaintiff, being duly sworn, testified on her own behalf, as follows:

I married Mr. William T. Miller in the year 1890. As a result of our marriage I have three living children. One of them is George W., who is very near 13 years old; one of them is William D., who was 9 years old in November; and Dorrace, a girl, who is six years old. Mr. Miller's earning capacity at the time he was hurt was between \$175 and \$200; it averaged upwards of \$175; I do not remember at any time for a year he had not drawn over \$175 at any time; he generally drew \$190; what he was drawing regularly was \$190.00.

During all the time of our married life he was very affectionate; just as affectionate as could be; he spent his entire time at home. He had no bad drinking habits; he was temperate, and did not use even tobacco nor beverage of any kind whatever. He was 41 years old a few days before he was killed. His health was as fine as could be; didn't know what it was to have an ache or a pain or suffer of sickness of any kind, and I never did know him to be sick in our whole married life,—at times he would get a little bilious and take a little medicine and lay off, but never in bed. He worked steadily

118 and seldom missed a run. His weight was 250 pounds; he was 5 ft. 10 inches high. He was a very active man. His

earnings each month he gave to me, the whole amount except his expenses; he gave me his entire wages and as he needed it he came to me and I gave it to him; his expenses on the road amounted to about \$16. and not over \$18. a month.

He was working for the Southern Pacific at the time of his death. He ran from Houston to La Fayette. He had been on that line, both as freight and passenger engineer, 19 years; he had not been on a passenger run very long regularly, but he had been an extra passenger man for years, and had been on the regular local for years, but not very long on a regular passenger run, very nearly a year. He had accepted at the time of his death his turn as a regular passenger man.

He took a great deal of interest in the children, rearing them, and spending his entire time at home, training and rearing them. Every day of his life, when he was at home, he expressed himself as to the interest he felt in properly raising his children. He did everything he could around the house to assist me in a general way, about house-keeping and in cooking and in doing everything like that, repairing the house, everything like that. He never spent an hour away from home, assisted me in making fires; the entire care of the children was on him when he was at home; I did not have the care of them at all. We always made our purchases in town together; he was always willing to advise and counsel with me. Was very amiable; I never saw him angry in my life; stayed right at home; I do not know whether he knew how to play cards; he never spent one hour away from home when he was off the road. I was 42 years old at the time of his death.

He died at 8:20 and I reached him at 12:30 the next day; brought him to Houston and buried him.

On cross examination, the witness testified:

After the death of William T. Miller, the Louisiana Western Railway Company paid me something that was due him.

I won't be sure whether it was the Louisiana Western or the T. & N. O., I know the T. & N. O. paid me.

In this connection a check made out by the Louisiana Western Railway Company, in the sum of \$4.00, and another one made out by the auditor of the same company, for \$76.45, drawn on the treasurer of said company, being exhibited to the witness, she recognized and identified her signature on said instruments, showing the receipt of the sums mentioned and the payment thereof, and also identified her signature to a bond given to indemnify the Louisiana Western Railway Company against loss on account of the payment without administration on her husband's estate.

And in this connection the witness also identified the signature of her husband, William T. Miller, as affixed to and endorsed on a check to him from the Louisiana Western Railroad Company for wages due him on account of services upon that company's railroad during the month of April, 1905.

In connection with the testimony of the witness Mrs. Fannie L. Miller, and as part of her testimony on cross examination, defend-

ants offered and introduced in evidence the following documents identified by her, to-wit:

1. A check reading as follows:

Louisiana Western Railroad Company.

Auditor's Office.

Check No. 234.

NEW ORLEANS, LA., April 30th, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the Order of W. Miller \$72# Seventy Two# Dollars, In full, for Services rendered to Louisiana & Western Railroad Company, during the month of April, 1905 on presentation of this Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed)

T. O. EDWARDS, Auditor.

Countersigned:

J. G. WHITE.

Payable at option of the holder at the New Orleans National Bank or the Citizens Bank of Louisiana, New Orleans, La.

Upon the face of this is stamped:

"Treasurer's Office. Paid May 24, 1905."

Upon this appears endorsed the name of W. Miller and of L. Domengeous, the name of W. Miller having been theretofore identified by the witness Fannie L. Miller as the signature of her husband

2. A check of the Louisiana Western Railroad Company, drawn by its Auditor on the treasurer of said company, in favor of W. Miller, reading as follows:

Louisiana Western Railroad Company.
Auditor's Office.

Check
No. 260.

NEW ORLEANS, LA., May 31st, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.

Pay to the order of W. Miller \$76.45 Seventy six & 45/100 Dollars, In Full, for Services rendered to Louisiana Western Railroad Company, during the month of May, 1905 on presentation of this Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed)

T. O. EDWARDS, Auditor.

Countersigned:

J. G. WHITE.

- 121 Payable at option of the holder at New Orleans National Bank, or the Citizens Bank of Louisiana, New Orleans, La.

This is stamped on the face "Paid," and bears endorsed upon it the name, Mrs. Fannie Miller, which was identified by her while a witness, as her signature.

3. A check of the Louisiana Western Railroad Company in favor of W. Miller, for the sum of \$4.00, reading as follows:

| | | |
|--------------|-------------------------------------|---------|
| Time Voucher | Louisiana Western Railroad Company. | Check |
| No. 5421. | Auditor's Office. | No. 55. |

June 1905. NEW ORLEANS, LA., June 29th, 1905. \$4.00.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the order of W. Miller Four Dollars For amount due a/c services as Engineer in June 1905.

(Signed)

T. O. EDWARDS.

CHAS. E. WERMUTH, Auditor.

Payable on Presentation of this Check, endorsed by him, and countersigned by J. G. White.

Countersigned:

J. G. WHITE.

This is stamped on the face of it "Paid" July 10, 1905, (signed) John B. Richardson, Treasurer, and bears as an endorsement the name of Mrs. Fannie Miller, which was identified by her while a witness, as her signature.

4. An indemnity bond executed by Mrs. Fannie L. Miller and J. H. Harral and Robert L. Jones, as sureties, identified by the witness Fannie L. Miller, having been given as indemnity to secure the payment to her of the checks dated May 31st and June 29th, respectively, above described, the bond reading in full as follows:

122 "Indemnity Bond for Pay of Deceased W. Miller.

Know all men by these presents: That Mrs. Fannie Miller of Houston, Texas, as Principal, and J. H. Harral, Rob't L. Jones of Houston, Texas, Sureties, are held and firmly bound unto the Louisiana Western Railway Company, in the sum of Eighty and 45/100 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our representatives, heirs and assigns firmly by these presents.

Signed and sealed this 7th day of July, A. D., 1905.

The condition of the above obligation is such that Whereas, the Said Mrs. Fannie Miller has presented to the said Louisiana Western Railway Company that W. Miller died intestate, on the 1st day of June 1905, and was at the time of his death indebted to no person whatsoever, and has further represented that said Mrs. Fannie Miller is (or are) the sole heirs at law and entitled to letters of administration on the estate of W. Miller.

And Whereas, At the time of his death, the said W. Miller was in the service of the said Louisiana Western Railway Company, and there was and is due to him from said Louisiana Western Railway Company the sum of Eighty and 45/100 Dollars for services rendered during the months of June & May, 1905.

And, Whereas, the said Mrs. Fannie Miller has applied to the said Louisiana Western Railway Company for the payment of the said sum so due as aforesaid without the issuance of letters of administration.

And, Whereas, Said Louisiana Western Railway Company is willing to make such payment on condition of being indemnified, and has this day paid said amount to said Mrs. Fannie Miller, the receipt whereof is hereby acknowledged.

Now, Therefore, If the said Principal herein shall indemnify and save harmless The Louisiana Western Railway Company, and its successors, and shall pay all damages, costs and expenses of
123 every nature whatsoever, including court costs and attorney's fees, which it, or its successors, may suffer by reason of the payment so far as aforesaid made to the said Mrs. Fannie Miller, then this obligation shall be void; otherwise of full force and effect.

(Signed)

Mrs. FANNIE MILLER.
J. H. HARRAL.
ROBT L. JONES."

Witness:

P. S. HOGAN.

T. E. CARDINELL, a witness for the plaintiffs, having been duly sworn, testified as follows:

About the 13th day of July, 1905, and after the wreck near Sulphur Mine on the Louisiana Western Railroad, I went over to the scene of the wreck and made some measurements, and after returning I made some memoranda of what I observed there. The point that I went to was two or three miles west of Sulphur Mine. I found some marks on the ties where an engine had apparently left the rails. She left 126 feet from where the gates were,—the gates where the road crosses, that would be west of the gates toward Houston from the road crossing to where she went off on the ties,—would be 126 feet by tape line. Where she struck the ties was 126 feet east of the gates. Those marks were on the ties, caused by the trucks of the engine where she dropped off the rails. It was 480 feet from this crossing to where she went over into the ditch, measured with a tape line, and was east of the crossing. The marks on the ties ceased at that point, that is, 480 feet east of the crossing, and there she turned over and laid on her side, where she had been.

I saw loose ties there on the right of way where she had been. They were rotten. There were 89 new ties put in the track and the old ties were pulled up; I did not count them, they were stacked up there; the number of new ties that had been put in and the number of the rotten ones piled up were similar. The new ties were
124 put in from where the engine left the track to where the engine went off at different intervals. They were put in differ-

at places and somewhere close to where the engine left the track. There were marks on the ties that had been taken out of the track. The ties that had been taken out of the track were piled up. I did not examine them to see whether they had marks on them or not; they were old rotten ties; they were all broken; just as rotten as they could be; I examined them; they were quite rotten.

I had been a railroad man for a good many years, about 27 years. I had run over that road a good many years. The usual effect of an engine striking an animal on the track where ties underneath were rotten, according to my experience depends on how you will strike the animal. If the animal went under the engine, the engine would roll like this and probably leave the track; if she left the track, there would be nothing to put her on unless she would run to a side-track or frog, or something; she might throw herself back on if it was a side track or switch or something, she might accidentally get back on.—I have known them to get back on at times. They don't often hop off and hop on again. When an engine is off the track the ties usually strike where it is filled in the center of the road and she bumps those ties and it throws the trucks either one way or the other and those trucks will slew like this and they will strike the rail and strike what they call the fish plate and over she will go. Whether she will go over immediately is according to the speed. The rotten ties will break right in two; she would cut them in two; the weight of the engine would cut them ties in two and she would go down and up like this; the trucks set like a beam there and they will whirl around, they set on a pivot like that, there is a bolt that runs up in the truck that holds them and the pin goes up and they set down on that with a regular little bit with a circle a little above it and the truck if she is on a rotten tie the weight cuts that tie in two

and she goes into the earth and if she strikes a good tie she would bounce up. As a general proposition the decayed ties could not help the situation any. They would tear up the earth and everything before it. The rotten ties certainly would tear up the track and the track would separate and away she would go.

I knew Mr. Miller in his life time; he was a man of first-class habits; his health was apparently good and he was a robust man, about 41 years old. He was a man very affectionate to his family and was a first-class engineer, one who could always get work. His wages as engineer were all the way from \$125 to \$200, sometimes more and sometimes less.

I have seen engines of the Louisiana Western Railroad Company with its name on them on the Southern Pacific track, that is on the T. & N. O. track. I ran them through from Houston to La Fayette, La. I was on this run 11 or 12 years, which was about 9 years before the accident. I have seen them on that road recently.

On cross-examination the witness testified:

It was about the 13th of July, 1905, when I went over to the point where this wreck had occurred. Prior to this time of going there I hadn't been there for a long time before the wreck. I do not know anything of the condition prior to the time of the wreck except from what I saw there on the 13th of July, 1905, which was

about a month and a half after the wreck. Mrs. Miller asked me when I went to Lake Charles to examine the track and I told her I would do it for her. I got my expense money from her to go over there, but received nothing else than expense money. My work has been that of an engineer; I used to work on a section one time in 1864, but had never worked on this railroad.

I did not examine the pile of ties any more than to see they were rotten; I looked them over and picked them apart; they were all rotten; they were all shattered down, probably there would be a crust on some of them, probably two or three inches that was not rotten through and through. I mean to say they were ties that ought to have been taken out a long time before they were;

126 they were rotten. I had no opportunity to see the track as it stood before the time of the wreck.

On my part, I did not leave the railroad company in an unfriendly mood, I had nothing against them. My feelings were good toward the company, but not toward a couple of the officials who were connected with the engineering department here in Houston.

On re-direct examination, the witness testified:

The ordinary distance between the ties in a track is between a foot and a half and two feet, and the tie is about 8 or 10 inches across, some more and some less; this would make about two feet from one tie to the other.

The plaintiffs next offered and introduced in evidence Rule number 334, contained in a printed Book of Rules and regulations, purporting to have been printed and issued under the authority of the "Morgan's Louisiana and Texas Railroad and Steamship Company and Louisiana Western Railroad Company," as a revised edition issued September 1st, 1902, and which was admitted to have been in force at the time of the injury and death of William Miller and Corley Gross, and copies of which had been furnished them and with which they were familiar.

Said Rule No. 334 reads as follows:

"334. It is the duty of every employé, regardless of department, to report defects in road or bridges, or obstructions of any kind, to the Superintendent, and, if possible, to the nearest section or bridge foreman. When necessary, flags and torpedoes must be left to notify approaching trains; and when there is any reason to believe that the safety of the track or of any structure is endangered by flood, fire or other causes, any employé, before attempting its use, must

127 make a personal inspection, using all precautions in the interest of life and property."

The plaintiffs offered and introduced in evidence printed rule No. 420 in the above mentioned book of rules, issued by the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, which Rule 420 reads as follows:

"420. The track must be kept clear; and it is the duty of foremen to turn out promptly with all their men and remove any obstruction, whenever notified by trainmen or others, even though the

obstruction may not be on their sections. If notified of broken rails on an adjoining section they must at once make track safe for trains.

Anything that interferes with the safe passage of trains at full speed is an obstruction."

FELIX GROSS and THERESA GROSS, having been duly sworn, each testified on behalf of plaintiffs substantially to the following effect: That they were husband and wife and parents of the deceased, Corley Gross; that Felix Gross at the time of the trial was 65 years old and Theresa Gross was 56 years old; that Corley Gross, the deceased, at the time of his death was 23 years of age; he was of good health and strength, sober and industrious and a dutiful son, and at the time of his death was in the employment of the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, as a fireman on locomotives drawing passenger trains running between Houston, in Harris County, Texas, over the Texas & New Orleans Railroad to the state boundary, and from that point over the Louisiana Western Railway to La Fayette, in the State of Louisiana, and that prior to his death he was earning an average of \$90.00 per month, the usual wages paid fireman for similar services;

128 that at and prior to the time of his death Corley Gross resided with his parents in Harris County, Texas, and that his parents resided in and now reside in said County and State; that the said Corley Gross while serving as such fireman on a locomotive drawing a passenger train running from Houston to La Fayette, was killed in a derailment of the engine near Sulphur Mine, on the railway of defendant Louisiana Western Railroad Company, on or about June 1st, 1905, William T. Miller, engineer of said locomotive, losing his life in said wreck at the same time and place; that about two months after the death of the said Corley Gross Felix Gross, his father fell from the roof of a house and broke his right wrist and right ankle, and the latter's ability to labor since said time has been much impaired, that otherwise he is in good health and strength; that Theresa Gross is in good health and strength; that the said Felix and Theresa Gross are without means of support other than that derived from their labor, and that they were dependent upon their said son for pecuniary aid, and that their said son, Corley Gross, gave his wages to his parents to be used by them for their support and maintenance, and they did use the same for such purpose, except about \$15.00 per month which he used for his own benefit; that the said Corley Gross often declared his purpose to contribute of his earnings to the support and maintenance of his parents so long as they, or either of them, should live.

In connection with the testimony of the witnesses Felix and Theresa Gross, as part thereof, the defendants introduced in evidence a check drawn by the Louisiana Western Railroad Company upon its treasurer, in favor of C. Gross, for the sum of \$38.52, in full for services to Louisiana Western Railroad Company during the month of April, 1905, which it is agreed was endorsed by the said Corley Gross and collected during his lifetime, and which, according to its face and with the endorsements thereon, reads as follows:

129

Louisiana Western Railroad Company.

Auditor's Office.

Check No. 279.

NEW ORLEANS, LA., April 30th, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the Order of C. Gross, \$38.52 Thirty Eight & 52/100, Dollars, In full, for Services rendered to Louisiana Western Railroad Company, during the month of April, 1905, on presentation of this Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed)

T. O. EDWARDS,
Auditor.

Countersigned:

J. G. WHITE.

Payable at option of the holder at the New Orleans National Bank, or the Citizens Bank of Louisiana, New Orleans, La.

Endorsements as follows: "C. Gross. Pay Bank of Lafayette, La Fayette, La., or Order. Pellerin Bros. Pay to the order of Any Bank, Banker, Bankers, or Trust Company, Bank of Lafayette, La Fayette, La. J. J. Davidson, Cashier. Through N. O. Clearing House. Endorsements Guaranteed. May 22, 1905. Louisiana Nat'l Bank."

In this connection, also, the defendants introduced a similar check to that last above described in the sum of \$40.91 payable to the order of C. Gross, in full for his services rendered to the Louisiana Western Railroad Company during the month of May, 1905, and drawn by said Company; and a similar check payable to the order of said C. Gross, in the sum of \$2.14, in full for his services rendered to the Louisiana Western Railroad Company during the month of June, 1905, both of which last mentioned checks, it is agreed, were paid to the plaintiff, Felix Gross, after the death of the said
130 Corley Gross; and in connection with the last two checks above described the defendants also introduced an indemnity bond, signed by Felix Gross and the sureties, which reads as follows:

"Indemnity Bond for Pay of Deceased, C. Gross.

Know all men by these presents: That Mr. Felix and Tracey Gross of Houston, Tex., as Principal, and R. H. Fonville, J. C. Silvey of Houston, Tex., Sureties, are held and firmly bound unto the Louisiana Western R. R. Company, in the sum of Two and 14/100 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our representatives, heirs and assigns firmly by these presents.

Signed and sealed this 24 day of July, A. D., 1905.

The condition of the above obligation is such that Whereas, The said Felix and Tracey Gross *has* represented to the said Louisiana Western R. R. Company, that C. Gross died intestate, on the 3rd day of June, 1905, and was at the time of his death indebted to no person whatsoever and has further represented that said Felix and Tracey Gross is (or are) the sole heirs at law and entitled to letters of administration on the estate of C. Gross.

And Whereas, At the time of his death the said C. Gross was in the service of the said Louisiana Western R. R. Company, and there was and is due to him from said Louisiana Western R. R. Company, the sum of Two and 14/100 Dollars, for services rendered during the month of June, 1905.

And, whereas, Said Louisiana Western R. R. Company is willing to make such payment on condition of being indemnified, and has this day paid said amount to said Felix and Tracey Gross, the receipt whereof is hereby acknowledged.

Now, Therefore, If the said Principal- herein shall indemnify and save harmless the Louisiana Western R. R. Company, and its successors, and shall pay all damages, costs and expenses of every nature whatsoever, including court costs and attorney's fees, which it, or its successors, may suffer by reason of the payment so as aforesaid made to the said Felix and Tracey Gross, then this obligation shall be void; otherwise of full force and effect.

(Signed)

FELIX GROSS.
TRACEY GROSS.
R. H. FOXVILLE.
S. S. MASSENGILL.

Witness:

J. C. SILVEY."

Plaintiffs here rest.

Defendants' Testimony.

J. A. SOBER, a witness for defendants, being duly sworn, testified as follows:

My name is J. A. Sober, and I reside at Sulphur, Louisiana, and have resided there since the year 1901, during which period I have been Manager of the Houston River Canal Company, Limited; my office is right at Sulphur Mine Station.

I recall the occurrence of a derailment and wreck near Sulphur Mine on the 1st of June, 1905, in which engineer Miller and fireman Gross were killed. I was at home in my bed that night when the wreck occurred; I got up very early the next morning and went to the scene of the accident, arriving there about half past 6 o'clock in the morning. The passengers were still there at the scene of the wreck when I arrived. The place where the cars were wrecked was within about a quarter of a mile of the lands of the Houston River Canal Company, Limited, which I had charge of; the premises adjoining the lands of the Houston River Canal Company were owned by the Union Sulphur Company; this latter company owned about 5

sections of land lying out on both the south side and north side of the railroad, and the Houston River Canal Company owned about
132 the same quantity, which was enclosed and located also both on the south and north side of the railroad track.

At the place of the wreck there is a gate in the right of way fence on each side of the track, the right of way being enclosed with a fence on each side. Those gates were built there in the right of way fences for the benefit of my company and the public in general, so that we could cross with our rice to bring it to the station so that we could get from one side of the track to the other. Besides ourselves crossing there, there were people who worked in the mines of the Union Sulphur Company and lived on the south side of the railroad, who also crossed back and forth, they crossed there, and further than those people and ourselves I do not think anybody had any particular use of the gates. So far as I know the railroad employ  s had no occasion to use these gates. For the purpose of fastening them, these gates had a kind of a slot, it was a stick, I think, about $3\frac{1}{2}$ feet long, I think, they call it a latch, which slips through into a slot made in the post on the other side; there was no difficulty in shutting the gates; the gate had a balance on the back end that made it very easy to swing. I had been warned by the section foreman to always keep the gates shut and as they were put there for my company I made special effort to see that they were kept shut; when I went through I shut them, but I found them left open by others many times.

Prior to the occurrence of this wreck I had seen stock inside the right of way fences many a time.

When I went down to the scene of the wreck in the early morning after it occurred, I found quite a wreck. I found the engine was thrown from the track and that the tender had reversed itself, turned a sommersault, and two or three cars were completely off the track.

I am familiar with the crossing and the surroundings as they were at that time and have been familiar with them several years. I have prepared a plat—the one now shown to me—and identified
133 by me—which indicates substantially the railroad track, the crossing, the two gates, the directions of the compass, the lands of the Houston River Canal Company and the Sulphur Mine Company, and the right of way fences and the timber and woodlands lying outside of the right of way fences, also indicating the location of the mine on the north side of the track, and Sulphur Mine Station itself, lying on the railroad to the east of the point of the wreck.

On cross examination, the witness testified.

I am President and Manager of the Houston River Canal Company, Limited, which is a rice company, and was in that position at the time of this wreck. I did not construct these gates, the railroad company put them there; the gates are in their right of way fences. I suppose that they knew these gates were being used by the public as they put them there for that purpose. The section foreman was constantly cautioning me to keep the gates shut; the reason of his so cautioning me was that they were being left open

and he knew this. The railroad people did not keep any watchman there at the gates that I know of, and I think I would have known if they had. The extent of their precaution as to those gates, so far as I know, was to notify me from time to time about keeping them shut.

The woods indicated on the plat are fairly thick on the south; the right of way was clear, but outside of the right of way the land was covered with wood and thick undergrowth. If cattle were ranging around in those woods you could not see them; in passing along they would have to be practically on the right of way to see them. The woodland country there is grassy to some extent and the cattle would go there to get that grass. As a general thing they would range around in the woods away from the right of way, feeding and grazing, and thus would be hidden from people going along on the train.

I have seen the section men there running cattle out of the right of way and have put them out myself from time to time and
134 have closed the gates; I have seen cattle right on the right of way and in the woods. I had seen cattle there on the right of way as much as twice, as much as three times, as many as four times, as many as six times; I fix it from the many times I had to cross there and have seen them in there that many times; my plantation is right by it. On the inside of the right of way, I think, I had seen them that many times; I suppose I had; this is my best recollection, and the period I have in mind extends since 1901. I am including the whole time that I have been there in this estimate. I could not say how many times I had seen them in there prior to the time Miller was killed. I know that I have seen them in there since he was killed and I would think as many as three or four times—have seen them in there as many as three or four times since he was killed and as many as six times before and after he was killed, and probably three or four times before he was killed, running over a period of about 4 years. It is a fact that I and others who used that gate, as well as the railroad people, made an effort to keep the cattle off the right of way and generally succeeded, and generally they did not stay in there a great length of time; the purpose and object was to keep them out of the right of way. I knew the danger of them getting in there—of them being in—and the railroad did. I would not like to put a limit as to the number of times I have seen the cattle in there; I have seen them in there before and after Miller's death.

During the Fall of the year I was there pretty often,—two or three times a week; during the planting season I would be in there about the same number of times; I think I would average two or three times a week. After I would get my crop out I would not be in there often; I would not be in there I should think to exceed two or three times a month.

There is a pretty fair dirt road extending from Sulphur Station down to those gates. Sulphur Station is about $2\frac{1}{2}$ miles from the gates. From the main public road to the railroad is a little over $\frac{3}{4}$ of a mile.

There is a section gang that lives at Sulphur Station. They have a hand car and other usual equipment, and they have no
 135 velocipedes, that I know of, and a regular section house. At Sulphur Mines there is a telegraph station, the agent himself is the telegraph operator and telegrams are received and delivered at that station, and were on the date of the accident. I do not know anything as to word being given to the station to get cattle out; I am not familiar with this matter; but I have seen the section men driving them out at the gates, and have myself received warnings from the section foreman to keep the gates closed and keep the cattle out. I suppose the gates belong to the railroad company, as did the right of way fences. The maintenance of these gates facilitated the rice farmers and those who raised products, in carrying them to the depot.

I reside in Louisiana and came over here to attend this trial at the request of the railroad company and my transportation was furnished by the company.

On re-direct examination, the witness testified:

I have stated on cross examination that I knew I had seen cattle in the right of way enclosure at this point as many as 6 times, but I did not say that this is anywhere near the number of times I have seen them; I think I have seen them more than that many times; I had seen them in there several times before this wreck.

The woods and timber that I speak of is not on the enclosed right of way, but outside and beyond the fences, and when I spoke in my testimony above of seeing cattle in the timber and woods, I did not mean that they were then within the right of way enclosure, they were outside of it. When I have spoken of seeing section men getting cattle out of the right of way, I meant that I saw them driving them out of the gates. The railroad track at and in the vicinity of this wreck was straight. In my answer on cross examination, that engineers or other people passing along over the track could not see the cattle in the timber, I had no reference to their ability to see cattle on the right of way, engineers going on the track and looking
 136 out, could see cattle on the right of way ahead of them as well as anyone could; *they* would have just as good opportunity, under such circumstances, to see them as anyone. The timber referred to by me was on the outside and the right of way was enclosed by the right of way fences. At and prior to the time of this wreck there was a muslin strip tacked up on each side of the gate posts, with a notice printed on it, requiring those using the gate to close it. So far as I know, the railroad authorities caused these notices to be posted up; I know they were on the gates. The notice now exhibited to me by counsel I recognize and identify as similar to those that I saw posted on these gate posts.

In this connection counsel for defendants offered in evidence and introduced the plat prepared and identified by the witness Sober in his testimony, and the notice as to closing gates mentioned in his testimony and identified by him, true copies of which, marked respectively, Exhibit A and Exhibit B are hereto attached as parts of this statement and are as follows:

(Here follows diagram marked p. 137.)

N

Houston River Canal Co. Ltd.
(Enclosed)

W.

Rice

- R. of W. Fence -

R. R. Track

- R. of W. Fence -

H. R. C. Co. Ltd.

Rice

S.

N

No. 821.
J. & N. O. R. Co. Ltd.
Miller
p. 137

mal Co. Ltd.
(Enclosed)

Woods Line
Union Sulphur Co.
Mine
(Unenclosed)

Rice

Woods

E.

RR.
Crossing
By Road

Sulphur Mine
Station

H. R. C. Co. Ltd.
Rice

Woods

Public Road.

Union Sulphur Co.
(Unenclosed)

S.

Woods Line

9

1

i

t

a

r

t

s

c

f

t

r

t

l

s

l

c

t

r

v

t

t

o

e

t

t

l

h

c

v

I

c

r

i

t

i

l

i

t

i

t

138

EXHIBIT B.

Notice.

These gates and the crossing are for the exclusive use of the owners and occupants of the adjoining land. Such owners and occupants are hereby notified and warned to see that the gates are kept closed. The Railroad Company will not assume any responsibility for stock killed or other damage done by reason of these gates being left open.

MORGAN'S LOUISIANA & TEXAS RAIL-
ROAD AND STEAMSHIP CO.
LOUISIANA WESTERN RAILROAD CO.

By W. F. OWEN,
Superintendent.

C. C. MALLARD, a witness for defendants, being duly sworn, testified:

I reside at Globe, Arizona. In the year 1905 I resided at Lafayette, Louisiana, and was assistant superintendent of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad and Steamship Company, with headquarters at Lafayette.

I remember the derailment and wreck on the Louisiana Western near Sulphur Mines, on June 1st, 1905, and was there shortly after its occurrence, arriving on the ground somewhere between 6 and 7 o'clock in the morning of June 2nd. I went there to transfer the passengers and with help. I found the locomotive and tender
139 down in the ditch and the baggage car and mail car and negro coach and first white coach sort of zigzag across the track, some of the cars were partly down the bank. I observed the right of way fences in that vicinity and they were in good condition. I do not remember noticing anything in particular about the gates. This was what we called a farm crossing and those gates were put there for the sole use of the people on either side of the railroad, who had to cross there. I cannot tell how many such crossings and gates there were on the railroad between Lafayette and the state line of Texas on the Louisiana Western Railroad, but there were several of them which were constructed just as these were. I had been connected with these Louisiana companies for a little over two years at the time of this wreck and during that period from time to time at different points along this line cattle would get in when people would leave the gates open.

At the scene of the wreck I observed a cow, or bull, and it was badly mangled and it looked like it had been dragged and mashed. It was close to the wreckage, where the wreckage was. I noticed from the position of this carcass, blood was on the track, extending back westward about 50 feet from the crossing. The Superintendent and road master and the section foremen had charge and supervision over these gates and crossings, and that did not come within my official duties.

On cross examination the witness testified:

I am now superintendent of the Gila Valley Globe & Northern Railway Company. At the time Mr. Miller was killed, in 1905, I was assistant superintendent of the Louisiana Western Railway Company. This company always put in gates at the private crossings and maintained them. We had a section gang located at Sulphur Mine. It was a part of the duty of the section gang to keep

140 cattle or other obstructions off the right of way, when they were notified of it or knew of it. Of course if the section foreman would find cattle on the right of way, he would drive them out and close the gates. It could not have been the duty of the section foreman to notify the superintendent, it would have been his duty to drive them out, whether the section foremen were notified from time to time, would be a question for the dispatcher to answer. I could not recall a particular instance of their having been notified. If there had been a whole lot of cattle on the track and the officers notified of it, the trainmen would be notified. The point at which the section foreman stayed at Sulphur Mine was not over 100 or 150 feet west from the depot, where the agent stayed; they had no telephone connection between the two places at that time.

There was a day telegraph station at Sulphur Mine at this time, but I do not recall whether it was a night station or not, but I think it was. It would take a section crew with a hand car about 15 or 20 minutes to go from Sulphur Mine to the gates opposite which this wreck occurred. I do not remember how train No. 9 ran at that time,—that was three years ago; I think it was about like it is now, the time card will show. It must have been after dark that it passed Sulphur Mine. This train leaves Lafayette about 5 o'clock. Edgerly is a station about 7 or 8 miles west of Sulphur Mines. I think a train would run from Sulphur Mine to Edgerly in about 12 to 15 minutes. Edgerly was a telegraph station in the day, but not at night, and Vinton was also a day telegraph station, but not a night station. Lafayette is something over a hundred miles from Echo. The telegraph station at Echo is both day and night. The day telegraph stations at Vinton and Edgerly are open from 7 in the morning till 7 in the evening.

If the section foreman at Sulphur Mine had notice that cattle were on the track and to go and clear it out, it would have been his duty to have gone immediately. There was an attempt always to keep the gates at private crossings closed; that was the purpose. Occasionally these gates would be left open just as your own gates would

141 be left open. We kept no watchman at these gates, it would have been too expensive. If we had kept a competent watchman at all the gates, stock could not have gotten through those gates. Notwithstanding the fact that we knew the cattle went in there and the gates were sometimes left open, we relied principally on the farmers or other people who went through there to close them after they had gone through, and we relied on the section men keeping watch and keeping the right of way clear. That part of the duty was not in me at all.

It is considered and understood that under Rule 420 cattle might, if on the right of way, be an obstruction to the full speed of a train. It was part of the discipline and method of operating the Louisiana Western Railway for the foremen to turn out promptly with their men and remove any obstructions, whenever notified by the train men or others, even though the obstructions might be on other sections than their own, and I suppose that practice refers to and follows Rule 334, that it is the duty of every employé, regardless of department, to report any obstructions of any kind to the superintendent, and if possible to the nearest section or bridge foreman. At and prior to the time of this accident my headquarters were in Lafayette, Louisiana, and my Jurisdiction extended from Algiers to Echo. Algiers is on the line of the Morgan's Louisiana and Texas Railroad and Steamship Company, and Echo is at the west end; there is a little gap in there, they call it the L. & W. extension. My jurisdiction extended westward just to the line between Texas and Louisiana. The movement of the trains operated under my supervision reached to Echo. I think the road-master's division of the Louisiana Western only extended to the bridge; Mr. Shackford was the superintendent of the Louisiana Western; he was under the immediate supervision of Mr. E. B. Cushing; the latter was General Superintendent and at that time under Mr. Fay, who was Vice President.

Mr. Fay at that time was Vice President of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad and Steamship Company; I could not say as to the Texas & 142 New Orleans Railroad Company. He had head-quarters in Texas, at Houston, and he exercised supervision over that road over in Louisiana, as well as any road he may have exercised supervision over in Texas. Each of these railroad companies operated under its own charter, so far as I know; they each reported to Mr. Fay, as vice president, so far as I know he had absolute control. Mr. Fay sometimes came over the Louisiana Western Railroad in his special car; no charges were collected from him so far as I know, I did not have control of this part of it. It was a fact that he had a right to ride over that road in his special car and I never heard of him being charged anything or being interfered with for making such trips. He was recognized as the head of that system.

Engines running over that system sometimes took fuel from the part of the road that was within my jurisdiction, at Lake Charles, Lafayette and Algiers. I do not know what they did on the west side of the Sabine River. It is only about 27 miles from Lake Charles to the Texas line, and Lake Charles was the last point at which engines would take fuel in Louisiana when going westward. I am unable to tell anything about the charges that were made by the different companies for furnishing fuel to each other's engines; this is information that may be gotten from the auditor; I never kept any account of that sort.

I employed the conductors and the brakemen; I had control over them while performing services on the railroads within my jurisdiction. I hired men that ran only to Echo. Lafayette was a ter-

minal and the crews ran in and out of Lafayette. At the time of this wreck I think the division was cut at Echo—I know it was. There were no freight crews running through from Lafayette to Houston; they ran only to Echo and back to Lafayette. No freight crews would run from Lafayette to Houston, but the passenger crews would; the purpose of stopping them at Echo was that the run was too long; on the passenger runs the endurance was not so hard and the crews would go through because the passenger service was more rapid. A passenger employé was not likely to take the
143 position that he would go from Lafayette to Echo and stop there and go no further; having undertaken to go on a run from Houston to Lafayette, he would realize that he would lose his job if he did not do so; these employés had an arrangement to that effect.

There is no repair shop for engines at Lafayette, but simply a round-house; ordinary repairs on engines are made there, and if any T. & N. O. engines needed such work as could be done at Lafayette, it would be done there, and if not, the engine would probably go for full repairs wherever the master mechanic and superintendent of motive power would say. There were two shops, one at Algiers, and one at Houston.

Mr. Fay, as vice president, exercised control over me and I followed his instructions. I do not know what company charges were made to for the trestle work on the bridge over the Sabine River; the superintendent of bridges and buildings of the Louisiana Western Railroad Company had charge of the bridge over the Sabine River and it was kept in repair by his forces; he took care of the whole bridge, but I do not know how the charges were made, but he did not have control of the yards at Echo, he had nothing to do with those yards, nor did I have. The part of the road from the middle of the bridge over the Sabine River to the station of Echo, in Texas, belonged to the supervision and charge of Mr. A. S. Johnson, who was superintendent of the Texas & New Orleans Railroad Company, whose road line extended from Houston westward to the middle of the Sabine River. Mr. Johnson, as superintendent of the Texas & New Orleans Railroad Company, had charge and took care of the track from the middle of Sabine River to Echo and thence to Houston, but the superintendent of the Louisiana Western Railroad Company took care of the bridge itself over the Sabine River. I simply had charge of the trains operated on the Louisiana Western Railway and ordering them in and out of Echo; I had nothing to do with the yards at Echo, but would simply send messages to Echo when to start the trains eastward; I merely had charge
of the movement of trains, that is all.

144 I do not know and am not positive whether Mr. E. H. Harriman came over the Louisiana Western Railroad when I was located at Lafayette, or not, I think he did, but I do not recall what date.

E. E. SHACKFORD, a witness for defendants, being duly sworn, testified as follows:

My name is E. E. Shackford; my residence Lafayette, Louisiana; I am now, and since 1905 have been, superintendent of the Morgan's Louisiana & Texas Railroad & Steamship Company and the Louisiana Western Railroad Company and the Iberia & Vermillion Railroad Company, with headquarters at Lafayette, Louisiana. The Morgan's Louisiana and Texas Railroad and Steamship Company's railroad runs from New Orleans to Lafayette, and its branches, and the Louisiana Western Railroad runs from Lafayette westward to the state line at Echo.

I have held this position since June 1st, 1905. I ran a train as conductor on the Louisiana Western Railroad as far back as 1888. The time card No. 18 shown me I recognize and identify as a time card of the Louisiana Lines in effect April 24th, 1905, and which was still in effect June 1st, 1905, when I went with this railroad as superintendent, and it remained in effect some time after June 1st, 1905; and the time table succeeding this one came out in the month of August, 1905. This time table identified by me was in force and effect June 1st, 1905. This time table indicates a schedule of all the regular trains that ran on these railroads, including the trains running between Lafayette and Echo on the Louisiana Western Railroad, but it does not indicate any of the trains operated between Echo and Houston, Texas; there was another and separate time table for them. This time table shown to me was issued and purports to have been issued by Mr. Cushing, general superintendent, of the Louisiana lines and by Mr. Owen, Superintendent and Mallard, assistant superintendent, and Mr. George, train master, these 145 were officials of the Louisiana lines. I did not in June, 1905, nor have I since, held any official position or connection with the Texas & New Orleans Railroad Company, and have had no jurisdiction outside of Louisiana.

I identify the document now shown to me as train sheet covering the movement of all the trains operated over the Louisiana Western Railroad on June 1st, 1905, beginning at 12:01 A. M. and ending at midnight the same date. This covers all trains running on that date on that railroad, both schedule and extra, the report being made up in my office by the train dispatcher, and entered by him concurrently with the facts. This identical train sheet was made up under my direct supervision and I personally know it to be a correct representation of the movements of the various trains, including their times of arrivals and departures at the several stations, as the same were contemporaneously reported by wire in my office at Lafayette. This train sheet served us both as a record and a guide for movements of these trains on that date. Extra trains are not put on the printed schedule heretofore mentioned in my testimony, but this train sheet has entered on it the extra trains, as well as the regular schedule trains, showing the hours of their arrival and departures at each station. This train sheet is kept and made up by the train dispatchers working in relays of three, each one having a period of 8 working hours. This train sheet

merely shows the arrivals, departures, and movements of trains on the Louisiana Western Railway and does not embrace the movements on the Texas & New Orleans Railroad after reaching Echo. There was never kept or promulgated at my office any train sheet or schedules for the movements of trains over the Texas & New Orleans Railroad between Houston and Echo; I had nothing to do with the business of the Texas & New Orleans Railroad Company; this was under the supervision of its own superintendent. These trains indicated on the time table and the printed schedule, as operated between Echo and Lafayette, were directed and controlled by the officials of the

Louisiana Western Railroad Company and the officials of the
 146 Texas & New Orleans Railroad Company had nothing to do with them.

In the case of passenger crews coming from Houston toward Lafayette, I, as superintendent of the Louisiana Western Railroad Company, would first take cognizance when they would arrive at Echo, and I, as superintendent of the Louisiana Western, would then begin to take charge of them from there eastward; and crews coming from the direction of New Orleans, would remain under my control and direction, as superintendent of the Louisiana Western Railroad Company, until they reached Echo.

During the year 1905 and including June of that year, the auditor of the Louisiana lines issued all pay checks for all service of its employes, such as engineers, firemen, and conductors, for work and service done and performed by them on the railroads in Louisiana, including the section between Lafayette and Echo. I do not know of any written contract, in this connection, between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, regulating the use of the respective tracks. I was generally familiar with the line of railroad of the Louisiana Western Railroad Company between Lafayette and Echo during the year 1905, before I went there, and immediately after I took charge of it at once became familiar with it. I am familiar with the vicinity of the wreck which occurred June 1st, 1905 near Sulphur Mine.

There were numerous private crossings on that railroad between Lafayette and the state line, as a general thing our stations in there are located 5 to 8 miles apart, and it was quite usual that you would find one or two of these private crossings between each of the two stations,—sometimes one and sometimes two; these private crossings were maintained there the same as everywhere else,—at the solicitation of some of the land owners who wished to cross over to get from their land on the one side to their land on the other. The facilities provided for this purpose consisted in an opening in the right of way fence and a gate placed there to be kept closed so as to have an enclosure when not in use. One of these gates was in the

right of way fence on each side of the track. There was al-
 147 ways more or less trouble then and now on other railroads, in regard to the gates being left open by persons passing through and cattle getting in through the gates and on the right of way, and we had our share of such trouble on the Louisiana Western. I formerly operated a train over that railroad. The right of way is gen-

erally fenced all through that country and has been so fenced for many years. I am familiar with the track along about Sulphur Mine where the injury occurred, and was about the time of its occurrence. The track in that vicinity is a straight, open track for about six miles, including the point of this wreck and is almost a water grade level. The right of way along there is well cleared and in the day time, and it would seem also in night times, that the engineer and fireman operating an engine along that line, ought to have no difficulty from their positions in the cab to look ahead and see stock in the right of way near the track on either side.

I have looked over the train sheet indicating the number of trains passing between Lafayette and Echo on the date of this occurrence, and find that during the entire day there were 16 or 18 trains passing, according to my recollection, that is, counting the trains going both ways; this was from midnight to midnight, including the date of the occurrence.

On cross examination the witness testified:

The railroad through Louisiana was fenced when Mr. Miller lost his life, and these gates in the right of way fences at the private crossings were made for the use of land owners. One of the objects in building the fences was to exclude cattle. Cattle gathered on the track are a menace to trains in motion and an element of cost to the company if they are killed. When animals were seen on the inside of right of way fences by section men, it was their duty to put them out. If train employes in running their trains discovered one or two animals on the right of way, I don't suppose they

148 would report it, but if they saw a bunch of cattle in there it was customary, but not a positive rule, that they should report it, but it was the custom, among the train and engine men, to report it at the nearest telegraph office if there was a bunch of cattle upon the right of way at a certain location. A half a dozen head of cattle would come under that practice. There was no rule that they had to do this; it was a kind of a mutual affair that they would do this. We have a rule in the books that employes should report anything in the way of obstructions to trains, and that was regarded as one of the things that might possibly be regarded in the way of obstruction if cattle got on the track in the way of trains. An animal of the cow species on the track is an obstruction and one liable to cause an accident, and if inside of the right of way fence was liable to get on the track and become a menace to moving trains. I don't want to create the impression that this rule has any specific relation to stock on the track; that rule has reference to other kinds of obstructions on the track—a bridge burned, or something piled on the track that would not let a train pass. It means any obstructions; there is another rule following that defines what an obstruction is; it says, anything that impedes the safe passage of a train is an obstruction. Cattle inside of the right of way would not be necessarily an obstruction until they were on the track. I would not call it careful railroading to run trains over the road with the right of way full of cattle; to run over the road with cattle on the right of way in bunches of four or five head, in one sense

of the word, would not be careful railroading, but it is done every day and everywhere, not only on the right of way, but station grounds and public crossings where there cannot be fences. We have not a positive rule that says that whenever cattle are seen on the right of way by employes they are required to report that fact; I have looked into that and I cannot find any basis for it. The handling of cattle on the right of way, or running into them, is so far from the direct control of the engineers or other employes, that we

do not charge their reports or charge their records with delinquencies for it, it cannot be done in active practice. I have given that question a good deal of thought. We don't charge the engineers with things as regard the killing of cattle, but an engineer at all times when he is able to help out will send in a report; the engineer is required to report the circumstances, it hardly ever occurs that an engineer fails to report the striking of an animal; if he hits a head of stock he will report it and state that he struck it. I think that if it is found out that he did strike one and did not report it, it would be marked against him. The custom is one of discipline. If a man fails to make his reports he will be reprimanded or disciplined for it.

If on the afternoon of the night that Miller was killed, either section 1 or section 2 of train No. 5 killed a cow near Sulphur Mine, it was his duty to report that he killed a cow, but he would not make this report to the nearest station; he would make a written report after he got in to the end of his run, in writing.

Train first No. 5, going west, on June 1st, 1905, passed Sulphur Mine at 4:25 in the afternoon; train second No. 5 passed Sulphur Mine, going west, at 4:35 in the afternoon, those trains, respectively, passed Edgerly at 4:39 P. M. and 4:49 in the afternoon of June 1st. They passed Vinton, respectively, at 4:51 and 5:01 P. M., that afternoon. They arrived in Echo at 5:15 and 5:30 P. M., respectively, June 1st. At the time of their arrival at Echo I would judge that the sun was about an hour and a half or two hours high, it was still daylight.

Train No. 6 (a passenger train) passed Sulphur Mine, going east, at 7:23 A. M., June 1st; train No. 10 (a passenger) passed Sulphur Mine going east, 10:45 A. M., June 1st; Train No. 60, local freight, passed Sulphur Mine at 6:50 P. M. Now this is the local freight that stopped their run at 6:50 and she was 22 minutes at Sulphur Mine. Sulphur Mine is east of where the wreck occurred. This local freight, No. 60, got to Sulphur Mine at 6:50 P. M. and left there at 7.12.

In June, 1905, only one of the officials of the Louisiana Western Railroad Company resided in Texas; that was Mr.

Fay, Vice President; he lived at Houston. My understanding is that he was also manager of the T. & N. O. Railroad Company in Texas. Our company, the Louisiana Western Railroad Company, had the same business with the T. & N. O. which we would have with the Kansas City Southern or any other connecting line. I know Mr. Fay was Vice President, but I can't answer positively what he was manager of; he was Vice President of the Louisiana Western and the

highest man in authority on the T. & N. O. as well as the Louisiana Western, I think. Dr. Knox, Chief Surgeon, lived at Houston; I know of no other employé of the Louisiana Western Railroad Company living at Houston who would be termed an officer. Mr. Kellogg had something to do with the company, as Engineer of Maintenance of Way; he resided at Houston; his position is an important one, he having charge of the entire right of way. Mr. Fay sometimes came over our Louisiana lines; I do not know, from my position, whether he paid for the privilege or not. Whenever the Louisiana Western ran trains through Louisiana into Texas and needed any fuel, they took it off of the line of the Louisiana Western, took enough to last them until they got into Texas, and took water the same way; they also took lubricating oil and supplies generally in emergencies, but I suppose they usually took enough for the round trip; and vice versa, they took enough supplies in Texas and used it in getting into Louisiana.

I don't think we had a general baggage agent at the time; if it was Mr. Monroe, his resident was in Houston.

A folder being here shown to witness, showing the officers of various railroad lines composing what was called the Sunset Route, was shown to the witness and by reference to it he said:

That correctly states the officers and where they live and the agents and where they live.

(And this folder was here introduced in evidence by plaintiffs' counsel in connection with the testimony of this witness.)

151 Said folder showed that E. H. Harriman was president of the Louisiana Western Railroad Company, and also president of the Texas & New Orleans Railroad Company; that W. W. Monroe was general baggage agent of the Louisiana Western Railroad Company, and resided at Houston, Texas; that A. V. Kellogg was engineer of maintenance of way of the Louisiana Western Railroad Company and resided at Houston, Texas, and that Percy Hewett was superintendent of telegraph of the Louisiana Western Railroad Company, and also resided at Houston, Texas; that W. H. Taylor was general agent at Houston, Texas, of the "Sunset Route" (which term "Sunset Route" was explained by a former witness;) that J. F. Sullivan was city passenger and ticket agent at Houston, Texas, for said "Sunset Route"; that Harry Redan at Houston, Texas, was travelling passenger agent for said "Sunset Route" and that Charles Hong at Houston, Texas, was Chinese and Japanese passenger agent for said "Sunset Route," and said folder contained the time-tables of the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, the Galveston, Harrisburg & San Antonio Railroad Company, and the Morgan's Louisiana & Texas Railroad Company. Said folder was stated by said witness to state correctly the name of said officials at the time of the wreck in question.

The different lines of railroad in Louisiana and Texas extending from New Orleans to El Paso, are all parts of what is known as the Sunset Route. It appears on this folder that W. H. Taylor was General Agent. I am not familiar with his position. I am causally

acquainted with Mr. Sullivan, the Sunset Route Agent. I think Mr. Monroe was also General Baggage Agent of the T. & N. O.

Our trains in Louisiana are handled from Lafayette from the train dispatcher's office, between Echo on the West and New Orleans on the east. I cannot answer as to what engines we used in running from Lafayette to Houston without referring to the records. I think there were engines of the Louisiana Western and also the G. H. &

152 S. A. I could not answer specifically their initials—what initials were on those engines, but they were run through and are now, with the same crews on passenger runs. The passenger crews would leave Houston, for instance, and would go through to Lafayette with the trains; they would have no option on a given trip of stopping at the state line or at the end of the road; the trains were scheduled through and these crews manned them through. The inquiry whether an employé who started on a passenger run from Houston to Lafayette would be allowed to stop off at Echo on a given trip, and thereafter kept in employment or let out, is a funny question; such a thing as that could not happen; it is like a man starting on his run and changing his mind and saying he would not go; they don't do that.

Our ticket agents on the Louisiana Western would, of course, sell through tickets from points on that line to any point in Texas; These railroads advertise a through service; this matter of advertisement is not in my department.

Mr. Fay, I believe, is and was, in 1905, Vice President; the highest representative of the Louisiana Western Railway Company, and all other officers were subordinate to him; I believe he holds the same position with reference to the T. & N. O. Railroad Company and did at the time of the accident.

On redirect examination the witness testified:

The ticket agent on the Louisiana Western Railway would not only sell a ticket from any station on that line to any station on the T. & N. O. or G. H. & S. A. in Texas, but would sell a ticket to a destination on any other line in the United States with which there was a connecting route, and would necessarily do so. This is a universal custom among railroads, and they all sell coupon tickets on lines all over the United States to any given point, without having any close relation whatsoever.

153 The expression "Sunset Route" is merely a term used for the purpose of advertising, as I understand, a given route, just as the expression "Southern Route," the "Piedmont Air Line," and other similar expressions.

In case of an engineer striking stock on a railroad track, it is neither the custom nor his duty to wire any report as soon as the accident has occurred; but he is required to make a written report on a blank form for that purpose which is turned in by him at the end of the trip to the master mechanic. The three forms shown to me by defendants' counsel, filled out and signed by William Miller and C. Gross, are examples of the form used (witness here referring to the stock killing reports submitted to him by counsel for defendants.)

I would not state positively that T. Fay is or has been Vice President of the Texas & New Orleans Railroad Company, but he was and is Vice President of the Louisiana lines.

On further cross-examination the witness stated:

It is true that E. H. Harriman is President of the Railroad Company owning and operating the lines in Louisiana and of the Texas & New Orleans Railroad Company.

I have nothing to do with getting up the folders presented to me and know nothing more of them than counsel.

Ordinary repairs on the engines used would be made at Houston; emergency repairs, at Lafayette, such as could be done, but it would be usual to have repairs done at Houston where the general shops were. We do as much repairs on cars in Louisiana as anywhere else. I cannot state specifically that such repair work would be done at Houston any more than in Louisiana. The cost of maintaining the engines in the service of both lines would be prorated on the miles they made upon each line; if they made a hundred miles for Louisiana Western and a hundred for Texas, the cost of that maintenance would be paid half and half; if it was a different proportion it would be so prorated. The work they do for each fellow that fellow pays for it, and it is divided by the mileage they make. The same rule applies in the repair of cars, except that the company owning them would pay for repairs of same when it is specifically known that the impairment occurred on its line; if we know defect occurred in Louisiana, the Louisiana company would have to pay for repair of that car.

I do not mean to say that the general shops for the Louisiana Western Railway Company are located in Houston. The general shops of the Louisiana lines are located in Algiers, La. These shops at Algiers belong to the Louisiana Western Railway Company and the Morgan's Louisiana & Texas Railroad and Steamship Company; but the through engines drawing passenger trains between Lafayette, La., and Houston, Texas, receive their repair work principally in the shops located at Houston. The engine that Mr. Miller was on at the time of the wreck was very badly damaged. It was brought to the Houston shops for repairs. I do not know whether that engine belonged to the Texas & New Orleans Railroad Company or the Louisiana Western Railroad Company, without looking at the records.

In connection with the testimony of the witness Shackford the defendants offered and introduced in evidence the printed schedule and the train sheet mentioned and identified by the witness in his testimony, which are as follows, in substance and effect, respectively, to-wit:

The printed time table is No. 18 and purports to have taken effect April 24th, 1905, and to have been promulgated and issued by E. B. Cushing, General Superintendent, William F. Owen, Superintendent, C. C. Mallard, Assistant Superintendent, and A. F. Church, train master for the Morgan's Louisiana and Texas Railroad & Steamship Company and the Louisiana Western Railroad Company, the printed schedule for the Louisiana Western Railroad Company covering the

operation of trains between Lafayette and Echo, shows the stations in their order and the mileage between them, aggregating the total mileage between Lafayette and Echo of 106.60 miles. This printed schedule shows, also, that there were 12 regular trains operated daily from Lafayette to Echo, and a like number operated daily from Echo to Lafayette during the period covering the date of this accident, the extra trains not being designated on this time table.

The train sheet here introduced in evidence consisted of a tabulated statement in the original handwriting of the train dispatchers on duty, covering the train operations and movements on the railroad extending between Lafayette and Echo, during the twenty-four hours of June 1st, 1905, beginning with 12:01 A. M. of that date and closing with 12:01 A. M. June 2nd, 1905. This train sheet contains a printed list beginning with Lafayette and showing in their order the several stations between that point and Echo, and showing the distances between these respective stations, as follows:

Lafayette, 5:14 miles to Scott; 10:36 miles to Rayne; 6:53 miles to Crowley; 6 miles to Easterwood; 2 miles to Midland; 5.49 to Mermontau; 4:94 miles to Jennings; 5:63 miles to Roanoke; 5:08 to Welsh; 10:47 to Iowa; 11:55 to Lake Charles; 2:32 miles to West Lake; 7.73 miles to Sulphur Mine & 7:73 miles to Edgerly; 5:41 miles to Vinton; 5 miles to Tumey; 4:76 miles to Echo.

This train sheet shows that during the 24 hours of June 1st, 1905, there were operated over the line of road extending between Echo and Lafayette and passing the point of the wreck, 12 regular and extra trains going west, and 14 regular and extra trains, including the wrecked train, going east.

This train sheet further shows by its tabulated entries, the following train movements:

That First Section of No. 5 (a passenger train, drawn by Engine 257, Dobbins engineer, a west-bound) left Lafayette at 1:18 P. M., June 1st, 1905, passing Sulphur Mine Station at 4:25 P. M., passing Edgerly at 4:39 P. M., and reaching Echo at 5:15 P. M. June 1st, 1905.

That Second Section of No. 5 (passenger train, drawn by Engine 251, with Wilson as engineer—on which the witness Reese was fireman—going west) left Lafayette at 1:28 P. M., June 1st, passing Sulphur Mine at 4:39 P. M., passing Edgerly at 4:49 P. M., and reached Echo at 5:20 P. M., June 1st, 1905.

That Train No. 245, drawn by Engine 194, with Hildebrand engineer, a freight train, going west, left Lafayette at 1:45 P. M., June 1st, passing Sulphur Mine at 8:15 P. M., passing Vinton at 8:55 P. M. and reached Echo at 9:30 P. M.

That extra freight train drawn by engine 213, with the witness Kimmer engineer, going west, left Lake Charles at 10:30 P. M., June 1st, 1905, passing Sulphur Mine at 11:07 P. M., reaching Vinton at 11:53 P. M., leaving Vinton at 11:56 P. M., and reaching Echo at 12:15 A. M., June 2nd, 1905.

That Local Freight Train No. 60, drawn by engine 173, going east, left Edgerly at 4:29 P. M., June 1st, 1905, reached Sulphur

Mine 6:50 P. M., left Sulphur Mine at 7:12 P. M., and reached Lake Charles at 8:35 P. M.

That Passenger Train No. 8, drawn by Engine 250, with engineer Miller (deceased) in charge, going east, left Echo at 11:02 P. M., June 1st, 1905, left Vinton at 11:23 P. M., met and passed west-bound extra freight drawn by engineer Kimmer, at Edgerly (time not noted on train sheet, but according to testimony of Engineer Kimmer, about 11:35 P. M.) and No. 8 then disappears from the train sheet before reaching Sulphur Mine, with the following memorandum noted on train sheet: "Wrecked $1\frac{1}{4}$ miles west of Brimstone." Brimstone is shown (on the map of the L. W. railroad, attached to the Printed time card introduced) to be situated between Edgerly and Sulphur Mine, close to the latter place, but the place referred to as Brimstone in this memorandum is not indicated in the list of regular stations on the time card or train sheet.

HARVEY HILDEBRAND, a witness for defendants, being duly sworn, testified:

My name is Harvey Hildebrand; I am an engineer on the Southern Pacific. During the year 1905 I was on the Louisiana Western in Louisiana.

I remember the derailment of a locomotive drawing a passenger train on which Miller and Gross were killed, somewhere near Sulphur Mine. On the date of that occurrence, June 1st, 1905, I made a trip between Lafayette and Echo, as engineer on a freight train. I came from Lafayette to Echo on that date;

I passed the scene of the wreck—where it afterwards occurred—about 8:30 P. M., it was dark when I passed there; I know where the derailment occurred; I judge this place was about $2\frac{1}{2}$ miles west of Sulphur Mine. In passing the point where the wreck afterwards occurred I did not encounter any stock nor observe any, so far as I remember. I heard of the wreck that night and after I had passed that point, if I had struck any stock there I would have known it, I did not strike any, nor observe any that I remember. The train that my engine was drawing was a freight train that ended its run at Echo. It was operated over what was called the Louisiana Western Railroad. The Superintendent of the road over which I operated and to whom I reported was Mr. Shackford. Mr. Owen had been the superintendent, but I think at that time Mr. Shackford had taken his position. I got to Echo on this trip at 9:30 P. M. I did not meet or pass the train that engineer Miller was operating; I arrived at Echo before he did. At that time I had been operating engines between Lafayette and Echo about two years. During that time on that portion of the road I had observed cattle inside of the right of way while operating the engine. I couldn't state how many cattle during that period I had seen inside of the right of way fences, but I often saw them, say, every trip or two trips, or something like that; I would see them inside the right of way fences along at different points between Lafayette and Echo.

On cross examination the witness testified:

I remember the crossing gate near the point where the wreck oc-

curred; I remember them. When I went by there that night I don't remember whether they were open or not, and I could not have seen them, it was after night. I don't remember that the gates were broken down about that time. I was pulling a freight train and ordinarily was looking on my track; I did not take much time looking on the sides. I do not know what other engineers expect as to the track being kept clear of cattle or other obstructions; I cannot say that as a general rule the track was kept clear of cattle, because I have frequently seen them. The fence was put there to avoid killing stock, I suppose; I suppose the fences were put there to keep cattle off the track, I don't know. I suppose that is what they were put there for. There were parts of the track that were not fenced in the city limits, in the town and city limits, I mean, for instance, places like Edgerly and Vinton, around the depots there was no fence; I know plenty of stations where no agent or employé is kept and where they are all closed at night; there are stations along that line where there are no employés. I don't know that it was the duty of the section men to keep cattle out of the right of way. On the railroad between Echo and Lafayette I would probably make three trips and see stock on the track every trip, and maybe would then make two or three trips and wouldn't see any; I do not mean to say that I always saw stock on the track at the place where this wreck occurred; I can't remember ever seeing any light at this exact place, but I had seen them along there between Sulphur Mine and Edgerly, and I have seen them around where the gate is, inside the right of way fences; I do not mean to say that I saw cattle there at the place where this accident occurred every time I passed there, but have seen them there at times during the two years that I ran by there; I had seen them on the track about where the wreck occurred before Miller was killed, within the two years that I had been running there; I was operating over that railroad as engineer when he was killed.

W. H. KIMMER, a witness for defendants, being duly sworn, testified:

My name is W. H. Kimmer; I am a locomotive engineer and remember the wreck of a passenger train on the Louisiana Western Railroad near Sulphur Mine, in Louisiana, June 1st, 1905, in which engineer Miller and C. Gross were killed, I was a locomotive engineer operating a through engine on that road at that time. On that date I left Lake Charles going westward to Echo. We got to Echo about 12 o'clock that night, June 1st, 1905; we passed the station of Sulphur Mine 4 times on that date, that is, making two round trips, passing Sulphur Mine on that day. On the first trip I passed Sulphur Mine and went to Echo and then left Echo and went back to Lake Charles and then I left Lake Charles at night, going back to Echo, and passed Sulphur Mine at 11:07 P. M. Sulphur Mine is about 2 miles or a little over east of where the wreck occurred. I reached Sulphur Mine at 11:07 P. M., and continued on west towards Echo. It was west of Sulphur Mine where the derailment occurred and the next station was Edgerly and in going from

Sulphur Mine to Ederly we passed over the point at which the wreck afterwards occurred. We met the passenger train that was being drawn eastward by Miller and Gross at Ederly; we reached Ederly and passed the east bound passenger train there about 11:35 P. M. When we passed the point between Sulphur Mine and Ederly, at which the wreck afterwards occurred, and which place I am familiar with, my engine did not encounter any obstructions on the track nor did I observe any stock there at that place or about there. When I arrived at Vinton after having met the passenger train at Ederly, we were asked by the operator at Vinton, which was a night office then, if we delayed or stopped No. 8 at Ederly, as she had not shown up at Sulphur Mine, which was another night office, and we told the operator that we did not, and on our arrival at Echo we heard of the wreck having occurred between Ederly and Sulphur Mine, so that No. 8, the passenger train on which Miller and Gross were engineer and fireman, thus had not reached Sulphur Mine and this was the cause of the inquiry made of us by the operator at Vinton.

On cross examination the witness testified:

I say that I did not observe any cattle within the right of way when I passed the point of the wreck; as a rule I looked ahead of my engine when I was running, but I sometimes have duties to perform that draw my attention to the inside of the cab; I don't remember of my attention being specially called to the inside of the cab when I was passing this point; I have no distinct recollection 160 when I passed this point of looking out ahead; I do not remember that my attention was occupied with something inside of the cab when I passed the point, though it is possible that I was so occupied. I do not think that it is possible that there were cattle there on or near the right of way that I did not see and that I could not have seen them. We will say the attention of the engineer was called inside of the cab, but his sight is advanced far enough to see ahead that there is nothing on the track when you look inside. You can see pretty far ahead on a straight track. I presume that I was moving about 30 miles an hour; that portion of the road was fenced and the object of the fence was to keep cattle off the track. I was not expecting to find cattle on the track at that point and was not especially looking out for cattle, and I don't think that I had my attention drawn to anything in the cab, though it might have been possible. I don't think that I could have passed any cattle on the right of way at this point and not seen them; it might be that they were on the opposite side from me, but they had got to be might far distant from me if there were any there without my seeing them, for you can see pretty far ahead; it was my duty to be looking ahead; the engineer is supposed to be looking ahead; there were woods along there; if the cattle had been lying down or been in the woods I don't know about seeing them; the only thing I can say is I did not see any.

I passed Sulphur Mine at 11:07 P. M. I guess it took me about 4 minutes to go from Sulphur Mine to Vinton, that would make it about 11:10 P. M. when I passed the point of the wreck and

the accident happened about 11:45, about 34 minutes after I passed there. I do not know anything about the cattle business; I did not notice whether the gates were open; I did not see any dead animal at or near the place where this wreck occurred as I passed, and I do not know whether there was one there or not; I did not see any cattle. If there was one lying there it just was not up where I could see it and that is the reason I didn't see it. I did not see any
161 cattle there, that is all that I can say. I never made a study of the habits of cattle and do not know anything about their characteristics when one of them is crippled or killed. I was raised partly in the country.

When cattle would get in the right of way the section boss puts them out; it is his business to do it. I guess it is a train employé's duty to report cattle on the right of way to the superintendent at the next telegraph station and to the station agent, if he is an operator. If after seeing cattle in the right of way, I saw a section foreman, I would throw off a note to him, that is, to the nearest section foreman and it would then be his duty to drive the cattle out of the right of way.

G. E. BUSTIN, a witness for defendants, being duly sworn, testified:

My name is G. E. Bustin; I live in Houston Heights, Harris County, Texas, but am working on the Frisco.

On June 1st, 1905, I was with the Southern Pacific Company, located at Sulphur Mine, in the state of Louisiana. I was section foreman for the Louisiana Western Railroad Company; my section took in one mile of the track east of Sulphur Mine station and 5 miles west of it. I remember the derailment of a passenger train on the night of June 1st, 1905, in which the engineer and fireman, Mr. Miller and Mr. Gross, were killed. I know the location of this derailment and it was within my section. At the time of this wreck I had charge of this section for probably 6 or 8 months was familiar with the condition of the track and roadbed at and prior to the time of the accident. The track was in splendid shape; in this vicinity it was a straight line and practically level; the right of way at this point and its vicinity was fenced; there was a private crossing right at the place where this happened and there was a gate in the right of way fence on each side of the railroad track. Those
162 gates were equipped with fastenings for the purpose of securing them when closed; the fastenings generally consisted of an upright post and a piece of timber nailed on the side, with a slide fastening that entered into a sort of a slot; when the gate was pushed together and this slide was pushed into the slot, it would make the fastening secure. These gates were used for the private crossings. It was a private crossing, I do not know whom it was built for, but almost anybody passing through there in crossing would use those gates. This crossing and these gates were not used by the railroad men. These gates were very often left open by people passing through them. I had trouble with stock getting in there. Every once in a while I would find some stock when I

would pass there; they would be in there and I would always shut the gate, I noticed that very particularly; I always drove the stock out when I found them in there and I was always particular about that.

I was along there on June 1st, 1905. On this occasion I found the gates open during that day some time; I don't remember what time of day, but I shut the gate that day. There was only one of the gates that I found open. At that time I found no cattle in there whatsoever. I can't remember what time of day it was that I found this gate open and shut it; I know I shut and closed the gate that day; my report shows I did and I know I did it that day, but I don't remember the hour and I don't remember whether it was in the morning or evening that I shut it, but my report showed that I shut it on that day. I went home from work that evening somewhere about 6 o'clock; I got into Sulphur Mine probably a few minutes later than 6; I had my section crew with me. There was a printed notice posted on these gates asking people to close them. The notice here shown is just exactly like the one that was posted at these gates.

(The witness here identifies the notice that was referred to and identified and introduced in connection with the testimony of the witness J. A. Sober, a copy of which appears on a former page of this statement.)

163 Continuing, the witness testified:

This notice was fastened on the gate on the outside of the gate.

I knew of this wreck I suppose in an hour after it happened; the conductor came down to my house and woke me up and I went down with my push car to haul the injured men to my house; we could not get any train right there at the time. I observed the wreck and it was a pretty bad one, the track was pretty badly torn up. We spent a good deal of the remainder of the night getting the injured men to the house and waiting on them. I was not there at day *light*; it was in the day before we got there to the wreck; I was up all night and I was waiting on the engineer, Mr. Miller; he was taken to my house; my section house was at Sulphur Mine, Louisiana.

I assisted in the repair of that track after the derailment and after the wreck was cleared; my men and I worked on the track under the supervision of Mr. Lawlor, who was road-master of the railroad company there. I cannot remember the exact number of ties that we used, but I guess somewhere about a couple of hundred that were broken that we had to replace; I did keep account of them, but I do not remember now the exact number. Those which were broken up we could not use again and took them out. I suppose we were a couple of days and probably three days engaged on this repair work before we finished. The ties which were broken up and which were discarded were sound; they were all sound ties; it is not true that they were rotten; they were sound, but many of them were broken and torn and split to pieces. We found some of the ties with dents in them from the point back where the derailment first started, and

we left some of these in there with the dents on them; they were perfectly sound and were just marked with the dents. Those that we took out were sound, but they were broken all to pieces so that — could not be used any more, and none of them were taken out on account of being rotten.

164 On cross examination the witness testified:

The ties that were broken and torn were just broken all to pieces so that they could not be used any more, and one tie would be so splintered that maybe it would be in 150 pieces; there were, I suppose, nearly a couple hundred of them were broken badly. There were a good many of them broken into very many pieces. I suppose that the track on which ties were broken up, covered, I suppose, about 200 feet, though I cannot remember exactly the distance; I don't think there were hardly any ties at all in this space that were not broken; I am satisfied there were not; they were all just brushed and broken to pieces.

There was only one head of cattle that had been killed that night. It was a big bull, I think, and was red; I never saw this animal before that derailment; that was the first time he had ever been on that right of way, so far as I know. I did not see any other cattle in there that night or the next morning; I did not get any cattle out of there on that day after the wreck; I looked to see if there were any cattle within the right of way the next morning after the wreck and did not find any, and this one that was killed was the only one on the inside at that time. I did see another dead animal in there the next morning; there was a dead yearling that was killed the second day before this occurrence, right at the same place; it came through this gate. The people had a practice of leaving gates open in going through there and I had to shut it every day. This other animal that was killed was a yearling and had been there from the second day before this wreck happened; it was right even with the gates; right at the crossing, I think it was; I suppose about 50 yards west of the crossing where this yearling was killed. This yearling was lying on the south side of the track down in the dump on the west side from the crossing, about 50 feet west of the crossing on the south side of the track; that was not the side that the bull was on; the bull was on the east side of the crossing and it was

165 on the north side of the track when I got there; it had been dragged out from under the trucks. The bull and the yearling were on opposite sides of the crossing; I guess they were about 100 yards apart. I had never seen either of these animals in there before, that I know of; I cannot say that I had seen these same ones.

I suppose the engine ran about 30 feet on the ties before it began to bunch them up; probably about 20 feet, I guess; it began to bunch them up; it appeared to run about 20 feet, I would think, I can't tell exactly, before it began to bunch the ties. The engine was derailed and the baggage car and the two front coaches were derailed. I can't swear to whether the marks I saw on the ties were made by the engine or the cars; but what I do say is that about 20 feet from

where the ties were bunched there were wheel marks on the ties that remained in the track; and whether these dents were made by the wheels of the tender or the coaches I could not swear, but I suppose that the marks I saw on the ties were made by both the wheels of the engine and the cars; I don't know, hardly, how they could have been made by the car wheels alone, though they may have been so made. The engine was down in the dump about 10 feet from the track. The rails and track were torn all to pieces; the rails were broken up and all thrown around and bent up and out of alignment, and the entire track was torn up. The bull was lying right up against the track when I saw it; I suppose it had been pulled out a little way. The track was torn up at that place. I don't remember exactly, but I suppose it was about 50 feet, probably a little over, from where this animal lay back to where the track was all torn up.

During the day of this accident I worked about $2\frac{1}{2}$ miles or 3 miles west of where the accident occurred; I worked out there all day; I started out at 7 o'clock, that is, I left my tool house, about 7 o'clock in the morning; I started from Sulphur Station when I went out in the morning. I quit work and started in to Sulphur Mine, I suppose, about 15 or 20 minutes of 6 in the evening and at that time was to the west of the place where this accident
166 happened, about $2\frac{1}{2}$ or 3 miles. We ran in on the hand car about 10 miles an hour, I guess, and passed by where this wreck occurred that same afternoon. I guess we passed that point coming in somewhere about 10 minutes after, or might have been very near 6, I don't remember exactly what time I got in that evening; some evenings I would be a little late coming in, but we passed that point close to six o'clock. I saw that the gates were shut that evening. I closed the gates that day, but I do not remember what time I closed them; my reports show it, and I know I did do it. I only passed that point twice that day and I must have closed the gate going out to work or coming back that evening; I could have done it coming back; I could have found them open coming back and closed them then, and if they were open when I came back, that is when I closed them. It was my duty to close them if I found them open. I saw no cattle on the track or on the right of way as I went in that evening; did not see any at all; I did not see this bull, but I saw the dead animal lying on the track at that time. If I had observed cattle in there on the right of way as I came in that evening, it would have been my duty to get them out and close the gates. If I had received notice from any member of the train crew passing by me that cattle were in the right of way, it would have been my duty in that case to have gone and drove them out and closed the gate; that is what I would have done and that is the practice.

On redirect examination the witness testified:

The dead yearling that I spoke of seeing I first saw lying dead at that point the second day before the accident happened. It had been killed the day before the accident. When I saw it it was lying, I suppose about 20 feet from the railroad track on the south side

of the track and on the west side of the crossing. It was our practice, if an animal has been killed at a point off where it doesn't bother anybody, occasionally to let them lie in such position and decompose, though we generally buried them if they were
 167 anywhere near to be offensive to anybody. There was hardly any passing there and it was not a public crossing at all; it was not used very often, nearly every day somebody would pass there, but just working men.

Right at that place sometimes every few days maybe one or more cattle would get in through the gates that would be left open. The animal that was killed in there a day or two before that wreck was far enough from the railroad track so as to be off the track; it was about 20 or 25 feet probably from the track and no obstruction to trains whatever.

L. LAWLOR, a witness for defendants, being duly sworn, testified:

My name is L. Lawlor; my residence Lake Charles, La.; I am roadmaster of the Louisiana Western Railroad Company, and occupied this position in June, 1905, and prior to that time. My division as roadmaster embraced the railroad between Lafayette, Louisiana, and Echo. I came on that division in March, 1905. My duties as roadmaster were to look after the repairs of the track, keep up the track and fence, and everything else connected with the railroad. I had under me to do that work 17 section gangs in all, located at various points and with various sections of line between the termini of my division. I also had one small extra gang.

I remember the occurrence of the wreck and derailment of a passenger train near Sulphur Mine on the 1st of June, 1905, in which Miller and Gross, the engineer and fireman, were killed, and I know and am familiar with the point at which this wreck occurred, and know of the condition of the road and track there and in that vicinity at the time of the derailment and prior thereto. The condition of the road bed and track at and in the vicinity of that point, at the time of the wreck and prior thereto, was first-class. On the day of the derailment and previous thereto, I was upon train No. 60, a local freight, sprinkling the track with fuel oil, between Echo and Lake Charles, and passed over the point at which the derailment afterwards occurred. I passed along over this point about
 168 half past five, P. M. The wreck afterwards occurred at that point about midnight. I was there — the wreck occurred. I went there to clear the wreck up that night after its occurrence. When I passed along there on the local train about half past five that evening before the derailment, I observed no stock within the right of way fences at or in that vicinity; I would have been very apt to have noticed any stock if they had been there at that time, because I was standing on top of an oil car attending to the valves and was sprinkling the track with oil to kill the grass on the track. From that point the train that I was on went on to Lake Charles. When I heard of the wreck I was in the Southern Pacific lunch house right opposite the passenger depot in Lake Charles; Lake Charles must be about 12 miles from the point of the derailment. Somebody

came to me and woke me up and told me there was a derailment over there. I got up and put on my clothes, came down to the passenger depot and 'phoned and found where the wreck had occurred, and about that time there was a relief train came and I went with the relief train to the point of this wreck and got there about 1 or 2 o'clock that night after the occurrence; the relief train met a push car and it had the engineer and fireman on it, taking them to Sulphur Mine; they had a flag and flagged us and we got those two men on the coaches we took with us; I helped put them there, the engineer and fireman both; and we took them to Sulphur Mine and brought them to the section house. Afterwards we went right straight to the wreck; they backed down to the train and I got off and walked down to where the wreck was, to clear the track and get it open. I wired for the section foreman, all the force I could muster to get to the wreck to clear it up, and we had the track open some time about 6 o'clock in the morning, partly open, as much as we could. We found where the engine got off of the track first close to a private crossing and that she ran about 195 feet before she got off the ends of the ties. I could determine this from the track of the wheels on the ties; I

169 saw the impressions on the ties for that distance from where the track was torn up. There are a good many of those ties in the track to show the impression of the wheels on them.

The engine ran about that distance and then I suppose it must have been the fire box or something got down and when she got off the ties, cut the end of those ties, from the appearance of the ties the bottom of the fire box caught the end of the ties and bunched them up and dragged them in bunches here and there and threwed the engine and cars all off. About 180 feet of the track was thus torn up. These ties that were thus torn up were in splinters, they seemed to be pretty sound timber; these ties were not rotten; I did not see a rotten tie in the bunch anywhere; they were all cypress timber. As soon as we got the cars off we started in to replace the rails and we had to use a rail of a lighter section until we got the 75 pound rail on the ground. We used the same kind of ties; used some of those that had formerly been in the track and used about 90 new ties. We put these new ties in place to repair the track in the former position where they had been all torn up. In my division of this railroad, from Lafayette west, there were a great many of those private crossings and gates just like this one. My experience with those crossings with gates was this, that it was impossible to keep the gates shut on them; the people along there leave them open, although we gave notice to keep them shut. I had notices such as this one (referring to that introduced in evidence in connection with the testimony of the witness Sober) sent out and they had been put up long before this derailment occurred; I caused one to be posted at this crossing; we had these gates at this point equipped with what are called standard fastenings; these gates were kept and maintained in good repair for the purpose of the people living in that vicinity, for the accommodation, principally of those people growing and hauling rice in there, and especially the Houston Rice and Irrigation Company, who had lands on both sides of the track, and it was at

the request of this company, for which Mr. Sober was the agent and manager, that this private crossing and the gates at this point were put in. The company for its own purposes had no use whatsoever for this crossing or these gates.

170 My employment and work, as roadmaster, was for the Louisiana Western Railroad Company; that company paid me for my services, and the T. & N. O. Railroad Company did not pay me anything.

On cross-examination the witness testified:

I was sprinkling the track with oil and passed the place of the injury about half past 5 o'clock in the evening; I did not notice anything along there except simply the trees and bushes and such as that; I did not notice anything irregular; I saw no live animals, nor dead ones; I did not notice any dead animal lying there near the crossing.

Part of the bridge across the Sabine River belonged to the T. & N. O. and part of it belonged to the Louisiana Western, from the Texas line; there is a post near the east end of the bridge that is called the state line post and my district runs up to that; up to that post. I look after that end of the bridge extending to the post and the T. & N. O. looked after the other; the Louisiana Western Railroad Company does not keep the bridge in repair; the Texas & New Orleans Railroad Company keeps it in repair.

FRANK P. DAVIS, a witness for defendants, being duly sworn, testified as follows:

I reside in Lafayette, Louisiana; I am stock claim agent of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad Company, and occupied such position in the year 1905 and prior to that time. My duty in that position was to settle stock claims, look into them, and handle everything pertaining to the stock business. In making my investigations and in the adjustment of claims for stock killed and injured on these Louisiana railroads, I have occasion to receive and consider the reports of such accidents sent in by engineers and firemen; I received all of those reports; they came to me as claim agent, from the master mechanic, J. P. Nolan, located at the shops in Algiers, La.; these reports are made out and sent to him by the engineers operating engines on the Louisiana Western Railroad Company, and he, in turn, sends them to me; and this was the course of business during the year 1905 and prior thereto. During the year 1905 I received, as claim agent, a good many reports of killing and injuring stock on the railroad between Lafayette and Echo. I recognize the three reports here now exhibited to me by counsel for defendants, as stock killing reports, made out and signed by William Miller and Corley Gross, as engineer and fireman. These are made out on the regular form furnished and required by the company and according to its usages. These three reports were sent to me from the master mechanic's office, Mr. Nolan at Algiers; he is the master mechanic that engineers operating on the railroad between Echo and Lafayette would report to and are required to report to. These re-

ports belong to my custody and were in my custody until turned over to the attorneys in this case, and I recognize and identify them as reports from my files.

In this connection the defendants offered and introduced in evidence the three stock killing reports referred to and identified by the witness Frank P. Davis in his testimony, true copies of which read as follows, to-wit:

"Trainmen's Report of Stock Killed or Injured.

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock—One cow Age about 9 years Color Red Condition Poor.

2. Train No. 6 Engine 252—Date Feb. 15th, 1905 Hour 8 A. M.

3. Was Stock struck killed or injured? Killed.

172 4. Day or night? Day Foggy or clear? Clear.

5. Was Stock struck on crossing or on station grounds? Neither.

6. Speed in miles per hour? 35. How many cars in train? 6.

7. Distance from nearest station? $3\frac{1}{2}$ miles west of Sulphur Mine.

8. How far off was Stock when first seen? One Telegraph pole.

9. Track fenced on one or both sides? both sides.

10. Were brakes applied? Yes.

11. Was Stock struck on straight line or curve? Straight line.

12. Was grade level, ascending or descending? Level.

REMARKS.—The above mentioned cow was standing out by to one side of Track & Run upon track just in front of Engine.

(Signed)

W. MILLER, *Engineer.*

C. GROSS, *Fireman.*"

Across the face of this is written in ink the following: "M/C March 14/05."

"Trainmen's Report of Stock Killed or Injured.

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock—one yearling—Age about 2 years. Color Red and white—Condition, fair.

2. Train No. 6 Engine 1443 Date March 7th, 1905 Hour 10:24 A. M.

3. Was Stock struck killed or injured? Killed.
4. Day or night? Day,—Foggy or clear? Clear.
5. Was Stock struck on crossing or on station grounds? Crossing.
6. Speed in miles per hour? About 50 How many cars in train?
6. 7. Distance from nearest station? about 3 miles east of Crowley.
8. How far off was Stock when first seen? I did not see
- 173 this yearling. It run upon Track from left side.
9. Track fenced on one or both sides? Both sides.
10. Were brakes applied? No.
11. Was stock struck on straight line or curve? Straight line.
12. Was grade level, ascending or descending? Level.

REMARKS.—The above mentioned yearling was down in ditch on the left side of track and run up on Track just in front of engine. I did not see it the fireman told me that engine struck a yearling.

(Signed)

W. MILLER, *Engineer.*

C. GROSS, *Fireman.*

Across the face of this report is written, in ink, the following:
 "M/C March 31/05."

"Trainmen's Report of Stock Killed or Injured.

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock one yearling Age about 2 years Color Red Condition good.
2. Train 5 Engine 1443 Date April 3rd 1905 Hour 4:33 P. M.
3. Was Stock struck killed or injured? Killed.
4. Day or night? Day Foggy or clear? Clear.
5. Was Stock struck on crossing or on station grounds? private crossing.
6. Speed in miles per hour? 15 How many cars in train? 6.
7. Distance from nearest station? 1¼ miles west of Midland.
8. How far off was Stock when first seen? about 4 Telegraph poles.
9. Track fenced on one or both sides? Both sides.
- 174 10. Were brakes applied? Yes.
11. Was Stock struck on straight line or curve? Straight line.
12. Was grade level, ascending or descending? Level.

Remarks: There was 3 or 4 head of cattle by side of Track and I applied the Brake and whistled some went on one side of Track and some on the other & this yearling Run upon Track from left side just as eng. came to crossing.

(Signed)

W. MILLER, *Engineer.*

C. GROSS, *Fireman."*

Across the face of this report is written, in ink, the following: "M/C April 15/05."

W. S. Cox, a witness for defendants, being duly sworn, testified:

My name is W. S. Cox; I reside in Houston, Texas; I am Master Mechanic of the Texas & New Orleans Railroad Company and have occupied this position for the past 9 years. I am personally acquainted with William Miller, deceased, and Corley Gross, deceased, who were engineer and fireman; I have knowledge of the history of Mr. Miller's connection with the railroad service, as engineer. He became a regular passenger engineer on January 30th, 1905; as a regular passenger engineer he was in what we term the "pool" between here and Lafayette—first in and first out. This arrangement was a matter of contract between the companies and the Brotherhood of Locomotive Engineers. What I mean by this is, say, we have ten or twelve men and there are 10 or 12 runs; the men running first in and first out of Houston, say for instance, you get in this morning, you get a 48 hour lay over and then you take your turn out, in the meantime there is a man goes out on the regular every day, filling the vacancy of every passenger run, going and coming.

I recognize the instrument which is shown to me by counsel as a personal record of Mr. William Miller; it is dated 175

August 17th, 1889, Louisiana Division. That was what was called the Louisiana Division of the old Southern Pacific at that time, it was made about the time when the Southern Pacific Company had these different lines in Louisiana and Texas leased. There is an agreement between the Brotherhood of Locomotive Engineers and the company whereby the company had a right to employ 50 per cent. of the men and would promote the other 50 per cent. from the Brotherhood of Firemen. There was and is a written agreement of contract that was entered into and existing prior to the time of Miller and Gross's employment, on the part of the different companies of Texas and Louisiana, represented by their respective officers, and the Brotherhood, along about February 1st, 1903, expressing the terms, privileges and rights of the different men employed as engineers and firemen. The same agreement was made on behalf of the Brotherhood with each of the Louisiana Railroad Companies and the Texas Railroad Companies, being signed for each of these several railroad companies by their respective officials.

Prior to the time of taking the regular passenger run between Houston and Lafayette, on January 1st, 1905, William Miller did not have any regular run, but afterwards had the regular run that was called the local, applying between Houston and Beaumont and between Houston and Echo; that run involved freight service and on that run he did not go upon the Louisiana Western at all. He afterwards left this local freight run voluntarily and went back into what is called the "Pool." His idea in that was to give him an opportunity to get the extra passenger run between Houston and Lafayette in case any of the regular men laid off. This regular

passenger run which he finally accepted January 30th, 1905, involved the through run between Houston and Lafayette, and this regular passenger run was ordinarily styled and considered among the Brotherhood of Engineers, to which Mr. Miller belonged, a preferred run. While he held himself in position to make the
176 extra passenger runs and whenever he made these extra passenger trips, they would carry him across the state line and upon the Louisiana Western Railroad to Lafayette and back. In other words, as extra man he filled the place of a regular man assigned to the passenger service between Houston and Lafayette. Ordinarily the engineers and firemen regarded this run between Houston and Lafayette as a preferment and advantage over the local run between Houston and Echo.

I knew Mr. Miller and Mr. Gross personally and dealt with them in connection with the service, and know personally that there was never any disposition on the part of either of them not to make the through run over the Louisiana Western Railroad Company and its railroad, as well as over the T. & N. O. railroad between Houston and Echo. This arrangement and run was preferred by them. Under the terms of the Brotherhood contract between the Brotherhood of Engineers and Firemen and the several railroad companies over whose lines, respectively, they operated, and according to the agreement with the company, it was optional with the engineers and firemen, including Miller and Gross, whether they would take the run of their choice or not. For instance, if a man was on a local run between Houston and Echo and he, according to his rank and order, was the next man for a passenger run, which was a preferred run, it was left to him, under the contract, whether he chose that preferred run or not, and his declining or failing to take the preferred run in the service, did not in any degree affect his seniority right in the future for such a run when there was another opening.

I recognize the printed instruments shown to me by counsel. One of them is a contract containing terms and rules and regulations of employment between the Brotherhood of Locomotive Engineers on the one part, and the Galveston, Harrisburg & San Antonio Railway Company, the Texas & New Orleans Railroad Company, the Galveston, Houston and Northern Railway Company, and New York, Texas & Mexican Railway Company, the Gulf, Western & Pacific Railway Company, the Louisiana Western Railroad
177 Company and the Morgan's Louisiana & Texas Railroad and Steamship Company, on the other. This became effective February 1st, 1903, and has been in force since said date. The other instrument shown me is a similar contract between the Brotherhood of Locomotive firemen and the same companies, with reference to the terms, rules and regulations to prevail in the employment of firemen in the services of said companies, or any of them.

The contract of the Brotherhood of Locomotive Engineers here exhibited and identified by the witness was signed by the Brotherhood of Locomotive Engineers, by S. M. Carter, Chairman, and

Charles W. McCoy, Secretary, and for the Railroad Companies by W. G. Van Vleck, for the Texas lines and T. Fay, for the Louisiana lines; and the other contract is signed regularly by the Brotherhood of Locomotive Firemen, by its authorized officers, and by W. G. Van Vleck and T. Fay for the Texas and the Louisiana lines, respectively.

In this connection the defendant offered and introduced in evidence Article XIII. Subdivisions C. D. and E, and I and N, which read as follows:

"(c) An engineer with seniority rights on any division, accepting an official position in the service of the Company, or being exclusively employed by the Brotherhood of Locomotive Engineers, on the lines of these Companies, retains, in either case, his seniority rights. If road engineers are set back on account of slack business, they lose, thereby, none of their seniority rights.

"(d) All permanent, vacant or open runs shall be bulletined for ten days; provided, the senior engineer or engineers of the division do not make application for said run or runs prior to the ten days' limit; but, in case the senior engineers make application for the runs, he or they shall at once be assigned and bulletin withdrawn. In case a run remains bulletined for ten days, and no application is made therefor, the junior engineer of the division shall be assigned.

"(e) An engineer refusing a run vacant or open to his
178 choice, by reason of his seniority right, forfeits thereby no seniority rights, but cannot, thereafter, claim the run refused, except in case of it being again vacant, or in case he is thereafter deprived, through no fault of his own, of a run which he holds.

"(i) Engineers on branches, or engineers found employed on roads acquired or leased, and thereafter operated as part of any division of Companies, shall lose thereby no seniority rights."

"(n) All previous agreements are hereby annulled. Either party desiring to change any of the foregoing rules or regulations shall give the other thirty days' notice of such desire, in writing, and of the change desired."

And the defendants in this connection also introduced provisions in the contract of the Brotherhood of Locomotive Firemen, above mentioned, which read the same in their relation to the seniority and other rights of firemen, as those above quoted with reference to engineers.

And thereupon the witness continued his testimony as follows:

Under the terms and regulations of these contracts, and according to the provisions quoted, while Mr. Miller or Mr. Gross had what you call the local run simply from Houston to Echo or Beaumont, with a freight, in the order of his seniority, if an opening was made for another engineer or fireman on account of the death or resignation of some one, to go with a passenger run regularly from Houston to Lafayette and return, and if Miller or Gross did not want such a run, it being then open to him and should decline to take it, according to the terms of this contract he was at perfect

liberty to decline the advanced position without being deprived in any sense of his seniority rights to accept the through run whenever there might be another vacancy of that sort, and if either
179 the engineer or fireman in the position of Miller or Gross had lost the position that he held, through no fault of his, he would nevertheless be entitled to take and receive such position on the through run as his seniority rights would entitle him to even to the extent of displacing a man already on that run who was of lower seniority.

The Louisiana Western Railway Company paid Miller and Gross for their services in operating the engine between Echo and Lafayette, on the Louisiana Western Railway; the Texas & New Orleans Railroad Company did not pay them any portion of their wages for their services performed on the Louisiana Western Railway. The Texas & New Orleans Railroad Company, and it alone, paid them their wages for services on its railroad from Houston to the state line. Miller and Gross reported to and were directed by the officials of the Louisiana Western Railway Company in reference to and connection with that company's railroad, in operating trains from Echo to Lafayette, and not to the officials of the Texas & New Orleans Railroad Company; and in connection with their work in the operation of trains on the railroad of the Texas & New Orleans Railroad Company, they reported to and were directed by the officials of the latter company alone. When an engine belonging to the Louisiana Western Railroad Company, while in use on the T. & N. O. Railroad, required repairs, and it was more convenient to take it into the T. & N. O. shops at Houston, we would bill against the Louisiana Western Railroad Company for the expense; and if one of the Texas and New Orleans Railroad engines for convenience was repaired in the shops of the Louisiana Company at Algiers, that company would bill for the expense against the Texas & New Orleans Railroad Company, and it would be thus discharged. The expenses of fuel and lubricating oil and expenses of that sort used for these through runs, was prorated between these two companies and paid by them according to the number of miles made by the engine on the railroads of the companies, respectively.

Mr. Miller was a member of the Brotherhood of Locomotive Engineers and co-operated in the agreement made, and in his employment and in his relation to the railroad companies, respectively, acted upon this contract as the basis of his employment
180 and relation; but independently of his membership in the brotherhood, his right to the privileges and regulations of the agreement, in any event, would be protected. It was a fact well known to Miller and to Gross, at all times, in the beginning and during their employment on this through run between Houston and Lafayette, that the Louisiana Western Railroad Company would pay them directly for their services while working and operating for it over its lines of railroad, and that the T. & N. O. Railroad Company would compensate them for their services while engaged in operating trains and working for it on its railroad; and that neither of the companies would pay any portion of the wages to them for services on the rail-

road of the other. This fact was well known and acquiesced in by both of them and was not concealed at any time from either of them and was known and open to them and was not concealed when they accepted this through run between Houston and Lafayette, as a promotion in the service; and neither of them ever made any complaint or objection to me to the through run or the method of compensation for their services. On the contrary, this run and this arrangement was desirable to them and was preferred by them.

I am familiar with the signature of William Miller on the check exhibited to me and recognize his genuine signature of endorsement on same. (The check here referred to is the one introduced in connection with the testimony of Mrs. Fannie L. Miller, covering the wages of William Miller, as engineer on the Louisiana Western Railway Company, for the month of April 1905.)

I am thoroughly familiar with the signature of William Miller; have seen him *right* it in my office a thousand times while acting as engineer, while I was master mechanic. The three documents exhibited to me, purporting to be stock reports, are signed by the genuine signature of William Miller, deceased. (The documents here referred to are the stock reports identified and introduced in connection with the testimony of the witness F. P. Davis, and
181 copies of which are hereinbefore inserted in connection with said witness's testimony.

Upon cross examination the witness testified:

I do not know anything about any arrangement between the T. & N. O. Railroad Company and the Louisiana Western Railroad Company prior to the death of Miller, about the use of each other's cars; that is not in my line of business; I know nothing of the cars. I only know of the engines. I do not know of any written agreement in reference to the cars or engines. I know that the T. & N. O. Railroad Company would sometimes run its engines from Houston to Lafayette and return, and that a portion of such runs would be over the Louisiana Western; and it is also true that the Louisiana Western Railroad Company would let its engines be run in the passenger service from Lafayette to Houston. There were 12 engines in the passenger service, and the Texas & New Orleans Railroad Company owned three of them, and the Louisiana Western Railroad Company owned three of them, the remainder of the 12 belonged to the Galveston, Harrisburg & San Antonio Railway Company—the other 6. The Galveston, Harrisburg & San Antonio Railway Company's engines that were used were kept in Houston and were run on the Louisiana Western and T. & N. O. Railroads. Houston was the point at which all of these engines were repaired. I do not know how the compensation for the use of the engines on the different lines was arranged; I think our auditor could give you figures on that question; I am not familiar with it and I could only tell you how they are prepared and distributed, but when it comes to the handling and distribution of the engines with reference to rentals, etc., I do not know. I know how the employes operating these engines were paid; they were paid for so many miles covered on the

T. & N. O. Railroad and the same way for service on the Louisiana Western Railway; they were paid so much a trip, this was divided between the companies on a mileage basis, prorated according to the miles. The distance between Houston and Echo is 182 111 miles, and the distance from Echo to Lafayette, I think is about 107 miles. It takes a little longer to run from Houston to Echo than it does from Echo to Lafayette; it did not necessarily happen that an engineer would start out from Houston and be delayed so that in fact he spent a much longer time on the T. & N. O. than was usual; it occasionally so happened if she should break down, and that afterwards he would go ahead and make his run over the Louisiana Western in the usual time. In that sort of a case the engineer might spend considerably more time in the service of the T. & N. O. than he did in the service of the Louisiana Western, and in such a case, while each company would pay the employés on the mileage basis for the service performed on their roads, respectively, yet the company on whose line the time was lost would have to pay the employés extra for the over-time; and in the case mentioned, where the delay was caused on the T. & N. O., the T. & N. O. would be responsible for and would pay the employés for the time lost. I mean to say that if the engineer lost time on the T. & N. O. track and was able to make it, or some of it up on the L. W., he would receive extra compensation for the time lost on the T. & N. O. Echo is the terminal, and in as much as he got to Echo late, being detained one hour and a half over-time, he cannot make up an hour and a half on the L. W. division, and the T. & N. O. would have to pay him the over-time that he would be entitled to. Where there is overtime on a run, we pay the engineer or firemen, both freight and passenger, so much per mile, and if he is detained on the road, say 40 minutes over the schedule of the train, he gets an hour for it; if he is detained less than a half an hour, say 20 minutes, he gets nothing for it. In order for lost time to count, it must be at least 30 minutes, if it is just 30 minutes then he gets an allowance for an hour. This basis exists as a matter of agreement and contract between the companies and the Brotherhood of Locomotive Engineers and Firemen.

183 The running repairs that we make on the T. & N. O. are handled exclusively on that road. If the engine runs through in joint service, that is, over the T. & N. O. Railroad and the Louisiana Western, then the Louisiana Western stands her pro rata of those running repairs, and this is calculated on the mileage basis. If one of the T. & N. O. engines becomes defective, while on the Louisiana Western Railway, it is nevertheless brought into Houston and repaired, if they be ordinary repairs, such as we frequently have, the expense of same is prorated according to the mileage on the railroads of the companies, respectively; each one stands its part of the proximate expense; and for the purpose of such ordinary repairs, it is immaterial on which railroad the engine is when the defect shows up; the expense of such ordinary repairs is prorated just the same.

On redirect examination he testified:

The time of the Engineers and firemen on these through runs for the service, between Houston and Echo is handled through the Superintendent of the T. & N. O. Railroad Company, and the time of these men on these through runs while they are on the Louisiana Western Railway, from Sabine River to Lafayette, is handled through the office of the Superintendent of the Louisiana Western Railway Company, with headquarters at Lafayette. I personally have no supervision over the accounts concerning these various expenses of supplies and repairs and know nothing personally of them; they are looked after by the auditors of the companies. In my department we simply keep account of the repairs and supplies and turn in the charges to our shop clerk and he sends them to the auditor. When we have repairs made on engines we itemize them and turn them over to the shop clerk and they are passed to the auditor's office and charged to the proper accounts. Those are details which I am not familiar with, but I know they are made on the mileage basis.

G. R. COTTINGHAM, a witness for defendants, being duly sworn, testified:

I am secretary and auditor of the Galveston, Harrisburg & San Antonio Railway Company and the Texas & New Orleans Railroad Company, and have been auditor of these two companies since June 1st, 1905; I think I was elected secretary some time in the month of June. I have no connection with the Louisiana Western Railroad Company or the Morgan's Louisiana and Texas Railroad and Steamship Company,—never had. I was general book-keeper for the Galveston, Harrisburg & San Antonio Railway Company and the Texas & New Orleans Railroad Company from the year 1894, in fact I commenced work in the auditor's office in the year 1892 here in the City of Houston and have been connected with that work ever since. I remember that when I first began to work in connection with the properties of these companies, they were under lease to the Southern Pacific Company; that was back in 1888; the operation under this lease was terminated July 1st, 1889. As secretary I am the custodian of and have the books of that period and since. I have the minute books containing the resolution terminating the lease of the Southern Pacific Company. Since the termination of that lease and up to the present time, the railroad and other properties of the Texas & New Orleans Railroad Company have been managed and operated by its own officers and for its own account. Some of these officers are appointed and some are elected by the Board of Directors. This was the case in the year 1905 and prior thereto and has been since and according to my knowledge and understanding. This company, the Texas & New Orleans Railroad Company, through its own directors and officers, has managed and operated its properties for its own account since the abrogation of the Southern Pacific Company lease, above mentioned. I know very little of the arrangement or operation of the Louisiana Western

Railway Company and its property in Louisiana except in a general way. The railroad of the Texas & New Orleans Railroad Company extends from the City of Houston, in Texas, to the Sabine River,

and from Sabine Pass, Texas, to Dallas, Texas, and there is
185 a branch line down to Port Arthur. The east and west line of its road extends from Houston to Sabine River. There is a little piece of road and track extending from the Sabine River to Echo that is now owned by the Texas & New Orleans Railroad Company; it was formerly known as the Louisiana Western Extension and was constructed and owned formerly by a Texas corporation known as the Louisiana Western Extension Railroad Company, but some years ago this was acquired, with legislative permission, by the Texas & New Orleans Railroad Company, as part of its road, and was so owned by it during the year 1905 and prior to June of that year. The railroad line of the Texas & New Orleans Railroad Company, as it now exists and did during the year 1905, goes to the Texas state line on the east, about the middle of the Sabine River, in fact, the middle of the draw span is where it is considered that the Texas & New Orleans Railroad ends.

In the case of those firemen engineers, conductors, and other members of the passenger crews who made the through run from Houston to Lafayette and return, using the same coaches and the same engines all the way through, the Texas & New Orleans Railroad Company paid these employes simply for their services on the Texas & New Orleans Railroad, according to their slips turned in, showing the extent of their service on it, and the Texas & New Orleans Railroad Company did not pay them anything for their service on the railroad of the Louisiana Western Railroad Company nor for their services in behalf of that company; the accounts and pay rolls for these matters are and have been handled in my office, as auditor of the Texas & New Orleans Railroad Company, and I do not know, and have never had, anything to do with the accounting or payment of these employes for their service on the Louisiana Western, or after the trains leave the line of the Texas & New Orleans Railroad Company.

I have in my files and before me the time rolls for Mr. William Miller, engineer, for the months of April and May, 1905, for the services performed during those months on behalf of the Texas & New Orleans Railroad Company. These rolls simply show the different trips and services performed by him between Houston and

Echo, between Houston and Beaumont, or Beaumont and
186 Echo, and there is nothing shown or accounted for on these rolls beyond Echo, or for any service whatsoever in the state of Louisiana, and I have kept in my office, as auditor, no other account of his services during those months; they are all that came through my office and all that I have anything to do with; for the other months of Mr. Miller's and Mr. Gross's services the pay rolls were kept the same way. In my office as auditor I never had anything to do with the pay rolls concerning the services of Mr. Miller or Mr. Gross between the time that they would leave Echo, going

into Louisiana, or until they got back and entered again their operations and service on the railroad of the Texas & New Orleans Railroad Company, and had nothing whatsoever to do with the pay checks received by them for their services on the Louisiana line.

The method of charging and making accounts for repairs on the engines or cars, or for the use of engines in the event an engine of the Louisiana Western Railway Company or the T. & N. O. Railroad Company should be used for the through trip, was, up to a short time ago, to divide the cost of repairs to an engine on the basis of the mileage made by that particular engine; if it made 100 miles on the Louisiana Western and made 100 miles on the T. & N. O., and there were any repairs necessary, the expense for that was charged half and half. In reference to the freight charges and passenger fares collected for the carriage of freight and passengers over parts of the two lines, the profits realized and the losses, if any, incurred incident to the business were not divided at all between the two railroad companies. The Texas & New Orleans Railroad Company receives compensation for what it transports and has nothing whatever to do with the freight collections or passengers fares earned by the Louisiana Western Railroad Company, and there is no difference in regard to these matters between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, from the methods of any other two railroad companies which are entirely distinct. There is no more sharing of losses and profits of joint business handled by these two railroad companies, than
187 there is between the T. & N. O. and the Gulf, Colorado & Santa Fe, or any other independent line that is a connecting carrier.

Mr. T. Fay, I think is General Manager of the Louisiana Western Railway Company, though I am not sure of that. To my certain knowledge Mr. T. Fay has not, for the last three or four years, held any official position with the Texas & New Orleans Railroad Company, and has not since I have been connected with this company, and I have been connected with this company since a date prior to 1905. I have before me the original minute book of the Texas & New Orleans Railroad Company which was kept in 1889, and find entered therein a resolution indicating the termination of the lease formerly had over this company's properties by the Southern Pacific Company.

In connection with this witness's testimony, and as part of it, defendants here offered and introduced in evidence said resolution, as the same appears in the minutes, reading as follows:

"Whereas the Southern Pacific Company has notified this company that it will as requested by this company surrender to it the properties leased to the said Southern Pacific Company by indenture of lease dated Feb. 10, 1885; the said surrender of lease to take effect at midnight on June 30, 1889, as the said leased properties may then exist. Therefore Resolved:

"That the surrender to the Texas & New Orleans Railroad Company by the Southern Pacific Company of the lease dated Feb. 10, 1885, to take effect at midnight June 30th, 1889, as the said leased

properties may then exist is hereby accepted by this company and the executive officers of this company will regard said lease as terminated from and after midnight June 30, 1889."

On cross examination the witness testified:

As to how that lease contract happened to become abrogated, I can only state from hearsay, I was not an officer of the company at the time it was abrogated July 1st, 1889; I cannot say where the election of officers of the T. & N. O. is directed from: they are selected at regular elections held by the directors and stockholders. The Southern Pacific Company is the biggest stockholder and naturally they could elect whatever directors they desired. Of course the Southern Pacific Company votes its stock and it is the majority stockholder. If we have any large net income for the T. & N. O. Railroad Company, we would send it to the assistant treasurer in New York, this is Van Deventer; he is assistant treasurer of the Texas & New Orleans Railroad Company and is treasurer of the Southern Pacific Company; he is regularly elected assistant treasurer of the Texas & New Orleans Railroad Company; he lives in New York, at 120 Broadway. The general auditor of the Southern Pacific Company is Mr. Young, and he has been so for 5 or 6 years. Mr. Young has no relation whatever to the Texas & New Orleans Railroad Company and holds no official position with it. Acting for the Texas & New Orleans Railroad Company, we send to Mr. Van Deventer whatever surplus money we have on hand, that is, whatever we do not need for use, from our treasury in Houston, it is sent to New York; it is not subject to dividends. There have been no dividends declared by the Texas & New Orleans Railroad Company since 1894; the books of the Texas & New Orleans Railroad Company show this fact. We have sent some money up to the assistant treasurer since 1904, but it has not been divided out; I know this fact because I keep the books of the Texas & New Orleans Railroad Company here in Houston and I know what we have standing to our credit; it could not be divided out without notice to us, in fact it could not be divided out without action of the Board of Directors of the T. & N. O. Railroad Company; they could not declare a dividend without they acted on it. The surplus of money sent from time to time by the Texas & New Orleans Railroad Company is standing to its credit with the assistant treasurer; I can't say as to how the balance has run; sometimes we have to send to New York for money when we get short here we call on the assistant treasurer for whatever we need, and of course whatever balance stands there is to the credit of the Texas & New Orleans Railroad Company. The account with our assistant treasurer, Mr. Van Deventer, is kept just as the account with any other officer of the company, just as the account with the treasurer here is kept; we have him charged with all the money we remit and give him credit for all he remits to us. There has been no dividend declared by the Texas & New Orleans Railroad Company since 1894; that is the last one; if a dividend were declared they would have to prorate the fund among each stockholder in proportion to his stock; if it was a 5 per cent. dividend, each stockholder would get 5 per cent. on his stock. In the event of a

dividend, I don't think each road would get anything; the Southern Pacific would get the dividend on whatever stock it owned, and all other stockholders would get dividends on the stock they owned.

With regard to repairs on the bridge over the Sabine River, the Louisiana line keeps up the east end approaches, and the Texas line keeps up the west end approaches; the draw span, if there are any repairs made on that they divide the cost between the two companies. The Louisiana Western and The T. & N. O. Any repairs made on the draw span would be divided equally between the two companies, no matter which side it is in, because you cannot separate repairs to that particular span. I could not say as to whether the two companies both own that span together or not; I understand that they both keep up this span and divide the expenses equally. I keep here at my office an account of the payment of bills and expenses on the Texas & New Orleans Railroad.

Referring to the printed folder by Cummings & Son, displaying the Sunset Route, I should judge the cost of printing that would be divided up between the lines east of El Paso. We have had several basis for dividing expenses of that character; some on the mileage basis, some on the train mileage, and some on the earning basis. Without referring to the particular voucher covering 190 that, I cannot say what basis was used. That was the custom in 1905 and prior to that time and since. In speaking of the roads east of El Paso I mean the T. & N. O., G. H. & S. A., Louisiana Western and Morgan's Louisiana & Texas. In joint expenses, or expenses incurred for the benefit of all of them,—advertising a through route—would be divided up on some agreed basis. I would not call that a community of interest, but they had this agreement. I understand that they advertise rather extensively in magazines and newspapers in the east; personally I am not familiar with that feature of it; possibly the T. & N. O. paid part of the expense, but I cannot recollect any individual payment made by it for such purpose. Speaking generally I would say that we paid our proportion of such cost; I cannot say whether it was on mileage basis or on gross earnings or train mileage basis, it was on some agreed basis; I cannot carry all of these things in my head, so as to say just what particular basis we used on any particular division of expense; some of it was on the mileage basis. A matter of that kind would be agreed to between the traffic representatives of the different roads, for instance our traffic man would agree with the traffic men of the other roads on what basis advertising expenses should be divided.

The expense of repairing engines in 1905 was prorated on the basis of engine mileage and this was true in June, 1905, and prior to that time. Engine mileage means the mileage of the individual engine the mileage any particular engine would run. We keep the repairs of that engine and of each engine separately. There are three classes of repairs to engines: First, running and shop and general repairs. The running repairs are based on the mileage the engine has made on the last trip; the shop repairs are based on the mileage the engine made since the last time in the shop; and the general repairs means the general overhauling, and is based on the

mileage the engine has made since the last time it received general repairs. For the mileage of each individual engine, a report is kept and that was the way it was handled. You might repair an engine at the end of its run to-day and you could not say whether the
191 repairs were made necessary by this trip or some trip made a week ago.

In the case of this accident, where the engineer and fireman, who resided in Houston, were killed on the Louisiana Western Railway Company, in Louisiana, the Louisiana Western would have to pay all costs; any verdict for damages that is assessed, the accident having occurred on that road, they are responsible. If the accident had happened on the Texas & New Orleans Railroad, the Texas & New Orleans Railroad Company would pay it. This is a located accident.

In regard to goods lost enroute, that is handled under freight association rules. All roads of the United States are working under certain rules and under certain conditions the loss is prorated, it depends on what the condition is, you have to establish first the seal record, and if it is an unlocated loss, there might be some reason why a certain road should have to pay the whole thing on account of its seal record being bad. If everything is ordinary, we would handle a loss between this company and the Louisiana Western just the same as between this company and the M. K. & T. or the I. & G. N., or any other road. If you cannot locate where such loss occurred, the two companies would have to pay it, sometimes on the mileage basis, sometimes on the revenue basis. By revenue, I mean based on the percentage which each road derives. There are a good many cases of lost goods which you cannot locate. There is no written agreement between these railroad companies; the basis of contract is the same understanding that we have with all roads that we have to do business with. There is no written agreement between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company regarding the use of the two tracks. I do not understand that the Texas & New Orleans Railroad Company ever had the Louisiana Western under lease. The Southern Pacific Company at one time had it under lease. I could not say how the trains were operated during that lease.

192 On redirect examination the witness testified:

There is and has been no contract between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, contemplating an occurrence such as the wreck in question, where employees were killed on the Louisiana Western Railway; that was clearly a Louisiana Western Railway proposition, and I make this as merely my own conclusion; I do not base it on any agreement existing between these two companies. What I mean is that if a voucher was put to me for distribution of the sum paid out for such an accident, and it showed that the accident had occurred on the Louisiana railroad, and for some reason the voucher had to be paid promptly by the Texas & New Orleans Railroad Company, under the order of the court, and I had to make the distribution of that voucher. I would charge it to the Louisiana Western

Railway Company, but I would not thereby be undertaking to fix the liability in case of such an injury on the line of either.

The Louisiana Western Railroad Company I understand to be an independent corporation and so is the Texas & New Orleans Railroad Company.

On further cross-examination the witness testified:

I do not know of any understanding in writing between the two companies under which an engine and a crew with a passenger train starts out of Houston and runs to Echo over the Texas & New Orleans, and from there continues on to Lafayette over the Louisiana Western. The manner of distributing this expense has been agreed upon from time to time between the different accounting officers and the operating men. I do not know anything about the original agreements. I presume the agreement would be made between the operating officers of the two roads; between the men who were in charge of the operation, but I have never seen a written contract. If there was a written contract to that effect, I would have it in my possession. By the parties operating the roads I mean the
 193 general managers or the general superintendents of the respective roads. If there is any written agreement I do not know of it, and I have not been present when any verbal agreement was made. My testimony is simply based upon the method of conducting the business, and that has been since 1905.

The defendants next offered in evidence printed rules numbers 343 and 371, set out in the Book of Rules issued by and under authority of the Louisiana Western Railroad Company and the Morgan's Louisiana & Texas Railroad and Steamship Company, which book had formerly been used by plaintiffs in proving rules therefrom. Said rules read, respectively, as follows:

"343. When trains are equipped with air brakes, enginemen will be held responsible for the rate of speed; but when trains are not so equipped, or when the air brake fails to work, conductors must see that speed is controlled by brakemen using hand brakes. When hand brakes are used they should not be applied so as to cause the wheels of cars to slide, nor kept on so long as to heat the wheels; to avoid this the applied brakes should be frequently changed from one car to another."

"371. Great care must be taken to prevent killing live stock, bringing the train to a full stop if necessary. If any stock be killed, or struck, the engineman must report it in writing, on the prescribed form."

The defendants next offered and introduced in evidence the plaintiff's Original Petition, and the file marks thereon, in the case numbered 37282, entitled Fannie L. Miller et al. vs. T. & N. O. R. R. Company, et al., which reads as follows:

"STATE OF TEXAS,
Harris County:

In the District Court of Harris County, Texas.

194 "To the Honorable Judge of said Court:

Your petitioners, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, plaintiffs, complaining of the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, defendants respectfully represent:

I.

That the plaintiffs are all residents of Harris County, Texas, and resided in said county at the time of the injury hereinafter alleged, and the said George W. Miller, William D. Miller and Dorace H. Miller, are minors under the age of twenty-one years *of age*, and appear herein by their next friend, the said Fannie L. Miller, who is their mother. That the said Texas & New Orleans Railroad Company is a railroad corporation duly incorporated as such under the laws of the State of Texas and operating a line of railroad in the City of Houston, thence through a part of Harris county and other counties to a point at or near the Sabine River, and having a local agent residing in Houston, Harris County, Texas, to-wit: C. W. Sedgwick and having also its principal office in said Harris County, Texas. That the said Louisiana Western Railway Company is a railway corporation duly incorporated under the laws, of, to wit, the State of Louisiana, and that it is operating a line of railroad in said State of Louisiana and thence into the State of Texas from a point on the Sabine River to the station known as Echo in said State of Texas, and having also a local agent in Harris County, Texas, to-wit: C. W. Sedgwick.

II.

That the said defendant railway companies are now, and were at the times of the occurrence of all the matters and things hereinafter related, engaged in—the said matters and things arose from and grew out of—a joint partnership arrangement between themselves, by which, among other things, the stock of said two railway companies, or a large majority thereof, is owned or controlled in common by certain persons directing their affairs, and they

195 solicit joint business and make through rates for the carriage of freight and passengers over both of said roads, and divide the profits arising therefrom and operate said lines as one continuous consolidated line between Houston, Texas, and a point in the state of Louisiana, to wit, La Fayette, and share between themselves the losses in operating said continuous line of railway, and use indiscriminately on one road or the other—as occasion or convenience may require—the engines, rolling stock and employes of each other, and each of them hiring and discharging employees for both of the lines of railway, and *a* each of them requiring the employes en-

gaged by it to render services on the line of the other company. That their employees operating trains are required to make the continuous run from Houston, Texas, to La Fayette, Louisiana, over the lines of both railroads, though instructed to go through some formality of making out separate reports to each of the respective companies. That all of these facts and circumstances existed at the time of the occurrences hereinafter mentioned.

III.

That the plaintiff, Fannie L. Miller, is the widow, and her co-plaintiffs, said minors, are the children and only children of William T. Miller, late of Harris County, deceased. That the said William T. Miller was heretofore an employee of said defendant companies—engaged by both of them—under the arrangement aforesaid as an engineer, operating a passenger engine for said companies, from the City of Houston to a point in the state of Louisiana to wit: La Fayette, and in the course of his employment, as his duty required him to be, was on, to wit, the first day of June, 1905, in the night time, on an engine operated by said companies as aforesaid, drawing a train of passenger cars from Houston to La Fayette. That while in the discharge of his duty aforesaid, and in the State of Louisiana, on the line of said Louisiana Western Railway Company, near the station known as Sulphur, the engine on which he was riding collided with a bull or other animal on the track 196 and was, because of the negligence and carelessness of said defendant companies, their agents and representatives in the particulars hereinafter stated, caused to leave the track on which it was running, and to jolt and jar and to fall from the roadbed or embankment on which said track was located and a quantity of hot oil used for generating steam was thereby caused to escape from said engine and onto the body of the said William T. Miller, and to shock, burn and wound him and cause his death within, to wit, a few hours thereafter.

IV.

That said injury and negligent killing of the said William T. Miller was caused proximately by the negligence and carelessness of the said defendants, their agents and representatives in this:

(First) That the line of said railway was fenced, and the presence of several head of cattle—one of which was the animal struck by said engine, causing it to leave the track as aforesaid—within the fence enclosing said line of railway was known to the said defendant companies, their agents and employees, especially the employees charged with the duty of reporting the presence of the same within said fence, for as much as to wit, seven hours before said animal was struck by the engine upon which said William T. Miller was riding, but that said defendant companies, their said agents and employees, especially those having such knowledge as aforesaid, negligently and carelessly failed to report the same or to use any care to cause their removal from within said fence, or to notify said William T. Miller

of their presence there, although one head of said cattle was struck and killed by an engine near the same point about seven hours before the striking of said animal by said train upon which said William T. Miller was riding. That at all of said times there was a rule of said railroad company duly established and promulgated, making it the duty of every employee regardless of department, to report obstructions of any kind to the superintendent of the road on which the same happened, and if possible to the nearest section or bridge foreman, and also defining that anything which
197 interfered with the safe passage of trains at full speed was an obstruction; also that the track must be kept clear and that it was the duty of foremen to turn out promptly with all their men and remove any obstruction whenever notified by trainmen and others, even though the obstruction might not be on their sections. Plaintiffs further allege that no notice whatever was given to said William T. Miller of said cattle within said fence and he had no knowledge whatever until about the same instant when said engine struck said animal.

(Second) That the ties supporting the rails at and near the point where said animal was struck by said engine as aforesaid, were old and decayed, and the sudden striking of said animal by said engine caused the rails to spread and the engine to leave the track, and that after partially leaving the track said engine was prevented from remounting the same and caused to leave the embankment because of said decayed ties, with the results hereinbefore alleged.

(Third) That the headlight to said engine was of an old style, burning acetyline gas and throwing a reflection for only a short distance, and said William T. Miller was therefore not enabled to see said animal until too close to the same to avoid striking it, and the fact that only said protection in the way of light was afforded was known to the companies aforesaid when it failed to give any notice of said animals on the track or to make any effort to cause their removal.

(Fourth) That the pilot or "cow catcher" at the front end of said engine and which was for the purpose of lifting animals and like objects from the track so as to not cause a derailment by running over them, was equipped with a long bar or projection connected with or near the same and extending out from the direction of said engine and over said pilot to a point about even with the end of said pilot, and only a short distance above the lower edge of said pilot (Near the roadway), and which projection was stationary in said position, thus causing animals or other like objects raised from the track by said "cow catcher" to be thrown back toward the

198 same, instead of being lifted high above and off of the track, as would be the case without such projection. That said company in using a projection of this kind could and would in the exercise of ordinary care have so provided that said projection of this kind could and would have been raised back towards the engine and there secured out of the way when not in use for coupling cars thereto, but that said defendant companies, instead of using the most approved and safest appliances in this respect, negligently provided

only the appliances above stated, and that said animal struck by said engine was caused to be thrown down toward the track and said engine coming in contact with the same on said track was derailed, with the results hereinbefore explained. That the said William T. Miller had been engaged for only a few weeks in running an engine carrying a pilot equipped with such a projection, and at the time when he was riding upon the same as aforesaid did not know of the danger attending the use thereof or of the negligence of said companies in this respect.

(Fifth) That the animal with which said engine collided as aforesaid strayed onto the right of way and track of said company through a gate which said company had caused or allowed to be built in the fence which enclosed its right of way and roadbed at and near the point where said collision occurred, and made no proper provision for keeping same closed or for keeping animals off of said right of way and roadbed at and near the point where said collision occurred, and made no proper provision for keeping same closed or for keeping animals off of said right of way, but negligently left the care of said opening to the owners and occupants of land adjoining said right of way, and the said William T. Miller had no knowledge that said company was negligent in this particular, and had every reason to believe and did believe that said companies caused the gate to be kept closed as against animals on said adjoining lands. That said gate was left open for a long period of time, to wit, twelve hours, and said animal along with others, strayed upon said track and was

struck by said engine and caused its derailment, with the results hereinbefore explained.

V.

That the plaintiff at the time of his death was but forty-one years of age, healthy and vigorous and then, and for a long time prior thereto, earning, to wit, the sum of two hundred dollars per month in his avocation as railroad engineer. That of this amount, to wit, one hundred and fifty dollars per month was contributed to the care, maintenance and support of all of said plaintiffs, and to the education of said minors, and if said William T. Miller had not been so killed he would have contributed to their care, maintenance, support and education in the future, the sum of to wit, thirty thousand dollars.

Wherefore plaintiffs pray that defendants be cited according to law to answer this petition and that on hearing plaintiffs have judgment for their damages aforesaid, to wit, said sum of thirty thousand dollars, and for an apportionment of the same between these plaintiffs as provided by law, and for costs and general relief.

(Signed)

BRASHEAR & DANNENBAUM,

Att'ys for Fannie L. Miller et al.

Endorsed: No. 37282. Fannie L. Miller, et al., vs. T. & N. O. R. R. Co. In the District Court of Harris County, Texas, 11th Judicial District. Plaintiffs' Original Petition. Filed November 22nd, 1905. Henry Albrecht, C. D. C. H. C."

The defendant next offered and introduced in evidence the following portions of the testimony of the witness HENRY P. DART, taken by depositions, to-wit:

"My name is Henry Plauche Dart. I reside at New Orleans, La.; am a lawyer; was admitted to the bar of Louisiana in New Orleans in February, 1879, and am still in the active practice, being the senior member of the law firm of Dart & Kernan; have enjoyed for many years, and still enjoy, a large practice in every branch of litigation, appearing before all the State Courts, the Federal Courts and the Supreme Court of the United States. During my whole professional life I have been constantly engaged in personal injury cases and have prosecuted and defended many such actions.

I believe I am able and qualified by knowledge and experience to state with substantial accuracy the law and the practice in the Courts of Louisiana in such cases.

There is no statutory or code provision in Louisiana on the subject of the relation of fellow servants, as a defence to the master. The question came before the Supreme Court of Louisiana in May 1851 for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. See *Hubgh vs. New Orleans & Carrollton R. R. Co.* 6 An. 495 to 514 (inc.). On its original hearing the court based its opinion upon the case of *Priestley vs. Fowler*, 3 M. & W. 1. On a rehearing the court rejected the Plaintiff's demand upon the ground that no action was then permitted for the death of a human being, and the rehearing opinion did not touch upon the question of fellow servant, but the case has been often cited on the first proposition and that doctrine so often approved, that it is now part of the jurisprudence of Louisiana.

"I have in some of the following citations referred to cases where the question is discussed authoritatively. See also *Weaver vs. Logging Co.*, 116 La., 468, 40 So. Rep. 798, decided in March 1906. This case contains a restatement of the law of Louisiana as it now exists. Referring to the *Hubgh* case the court said, page 472: "The doctrine that the servant assumes the risks of his fellow servant's negligence was examined in the *Hubgh* case and has ever since been uniformly followed in the jurisprudence of this State. This doctrine is based on an implied agreement that the servant undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant. Id. This rule of law seems to us to be reasonable and just, as otherwise the master might be held liable without any fault whatever on his part for an accidental injury by one servant on his fellow." * * *

I would answer further on the case stated that the engineer and fireman in the operation of the locomotive are fellow servants. See cases above referred to and *Satterly vs. Morgan Louisiana & Texas R. R. & S. S. Co.* 35 La. An. 1166 and statements arguendo in the

Towns vs. R. R. Co. case 37 La. An. 632. See also Jones vs. Southern Pacific Co. 144 Fed. Rep. 973.

The engineer Miller and the fireman Gross, accompanying each other and co-operating on the moving locomotive, were fellow servants, within the meaning of the laws of Louisiana prevailing and in force at the time of this wreck, so that neither of them could recover of the railroad company for injuries resulting from the negligence of the other. At the time of the wreck and derailment in question, there was no statute in the state of Louisiana on the subject of fencing railroads, and I know of no decisions of the courts of Louisiana requiring railroad companies having and operating railroads in the state of Louisiana to fence their railroads or tracks.

It appears that the Louisiana Western Railroad Company was incorporated by Act 21 of the Acts of the General Assembly of Louisiana for the year 1878 and was approved on March 30th of that year and is to be found printed and bound in the official publication of the Acts of the Legislature for the year 1878 on pages 258 to 268 (inc.). This act consists of ten closely printed pages, is accessible and is admissible in evidence under the laws of this state and I presume under the laws of Texas, in the form of its official publication, as above stated, and therefore I do not undertake to attach a copy of same to my answers.

I do not know of any amendment or alteration by the Legislature or any other authority, altering or eliminating the language or effect of section 17 of Act. 21 of the General Assembly of 202 Louisiana for the year 1878, above mentioned.

I am familiar with the Constitution of Louisiana of 1898. It contains the clause numbered Article 48, which reads as follows: "The General Assembly shall not pass any local or special law on the following specified objects: * * * creating corporations, or amending, renewing, extending or explaining a charter thereof. * * * Grant any corporation, association or individual any special or exclusive right, privilege or immunity."

I find a similar provision to this in the Louisiana State Constitution of 1879, numbered Article 46, adopted July 23rd, 1879. These two constitutions were not adopted and were not in force at the time of the passage of Act 21 of the General Assembly of Louisiana for the year 1878, creating the Louisiana Western Railroad Company. There was no such provision in the Louisiana Constitution of 1868, which was in force at the time of the passage of the Act of incorporation of the Louisiana Western Railroad Company, which was approved March 30th, 1878. This law of incorporation was passed under the dominion of the Constitution of Louisiana of 1868.

I have not convenient a spare copy of the Constitution of Louisiana of 1868, which was the Constitution existing on the 30th day of March, 1878, but you will find a printed copy thereof issued in the volume of the Revised Statutes of Louisiana, printed by authority of the State of Louisiana in 1870.

I am not counsel for the defendant company in any of the courts of the state of Louisiana, or elsewhere, or otherwise.

I am not aware of any case decided by our Supreme Court of Louisiana holding that the failure to fence a railroad might be taken into account by a jury in determining the question of negligence on the part of the railroad company, for an injury caused to a passenger or to an employé by the derailment of an engine or train.

I am not able to say that the rules of the common law as generally understood throughout the United States are looked to in Louisiana in determining questions of contributory negligence and assumption

of risk in actions for personal injury brought by servants
203 against their masters. I refer to my testimony already given here. My understanding is that the Supreme Court deter-

mines in each case whether there is contributory negligence primarily as a matter of fact, and the rule is general that if on the whole case it appears that the accident would not have happened but for the negligence of the injured person contributing thereto, there can be no recovery. In considering this the doctrine of the 'last clear chance' plays its part. I have already shown by references to the cases of Hubgh, Weaver and Duncan and other cases cited, that the servant is, as matter of law, supposed to assume the risk of personal injury, subject to the qualifications stated in these cases. The Evans and Merritt cases indicate this also. It is clearly stated in the Weaver case that the servant whose negligence is assumed as one of the risks of employment, is a person actually engaged on the same physical work with the injured person.

At the time the charter of the Louisiana Western Railroad Company was granted by the Legislature of Louisiana, in 1878, it had authority under the Constitution of Louisiana to create corporations by Special Act, a power which it frequently exercised, in fact it may be said to have been the public policy at that time.

Whether the provisions referred to are 'special or exclusive rights, privileges or immunities' it would seem to me, is a matter of Judicial determination. In the absence of any provision in the Constitution of 1868 prohibiting same I would hesitate to pronounce the provisions in question to be in that category. In a legislative charter it would seem to me to be entirely within the province of the Legislature, unrestricted by constitutional limitations to grant, limit or specify the rights, duties, powers, etc., of its own creature. In this connection you will recall that the constitution of 1868, already referred to, is that Constitution under which the Acts were passed which are interpreted in the Slaughter House cases in the Supreme
Court of the United States.

204 I am not aware of any decision construing this particular provision of the Charter of the Louisiana Western Railway Company. Other provisions of the same Statute have been passed upon by the Supreme Court, thus the provision giving that corporation the right to expropriate property by special procedure was recognized and enforced in *La. Western R. R. Co. vs. Central & Improvement Company*, 119 La. 927, 44 So. Rep. 732; also the special privilege in the charter of the *Morgan's Louisiana & Texas R. R. & S. S.*

Co., Act. No. 37 of 1877 in regard to immunity from suit except at domicile was affirmed in *Heirs of Gassin vs. Williams, et als*, 36 La. An. 187 and *St. Julian vs. Morgan's La. & Tex. R. R. & S. S. Co.* 39 La. An. 1063.

I should consider the provision of Sec. 17 of the Act of 1878 incorporating the Louisiana Western R. R. Co. valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in Louisiana, it would seem reasonable where the Legislature has the right to create a corporation by special act, that it would safeguard the grant or regulate or control rights or privileges under it, with the same validity that it could make the original grant.

I should consider the charter of the Louisiana Western Railroad Company as partaking of both characters, that of a private Act and a public law. It is unquestionably a law, but I am not aware of any decision holding that the courts would take official notice of it. I should consider it necessary to prove it in order to get it before the courts under our practice and law; in any event, that's the course I would follow if I were seeking to maintain it before our courts.

In the absence of decisions upon the subject, I should certainly plead and offer the statute if I were to defend the case. The proof of it in this state would be a mere matter of offering the printed volume containing the Act, which is issued under the authority of the State of Louisiana.

I am not aware of any Constitutional provisions which
205 nullify or neutralize the provisions of the Charter aforesaid.

As to the effect of the Article of the Constitution of 1879 and 1898 of the state of Louisiana above referred to, I would not consider these provisions to have the effect of nullifying or neutralizing this charter."

The defendants next offered and introduced in evidence Act No. 21, incorporating the Louisiana Western Railroad Company, being an Act of the Louisiana Legislature of 1878, approved March 30, 1878, and published and printed on pages 258 to 268, inclusive, of said Acts, under authority of the State of Louisiana, and Section 17 of which Act reads as follows:

"SEC. 17. Be it further enacted, etc., That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for

such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life.

206 or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

The defendants next offered and introduced in evidence the adjudicated cases and decisions and the reports thereof, as follows:

Decisions in Support of the Immunity Provision of the Charter.

Louisiana Western Railway Co. vs. Central & Importing Co.,
119 La., 927, 44 So. 732.

Heirs of Gassin vs. Williams, et al., 36 La. An., 187.

St. Julian vs. M. L. & T. R. R. & S. S. Co., 39 La., 1063.

Pecot vs. Police Jury, 41 La., 707; 6 So. Rep., 677.

Article 110 Louisiana Constitution, 1868.

Article 2315, Revised Civil Code of Louisiana, 1870, page 283, reading as follows:

"Art. 2315 (2294). Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother of either of them, for the space of one year from the death."

Vredenburg vs. Behan, 33 La. An., 643.

Id. 37 La. An., 652.

Eichorn vs. Ry. Co., 112 La., 250; 36 So. Rep., 335.

Ry. Co. vs. Richards, 68 Tex., 375.

On Fellow Servants.

Hubgh vs. N. O. & Carrollton R. R. Co., 6 An., 495-514.

Weaver vs. Logging Company, 116 La., 468; 40 So. Rep., 798.

207 Bell vs. Globe Lumber Company, 107 La., 725; 31 So. Rep., 994.

The defendants next offered and introduced in evidence the Plaintiffs' Original Petition, and the file marks thereon, in the case of Felix & Theresa Gross vs. T. & N. O. Railroad Company, et al., which reads as follows:

"THE STATE OF TEXAS,
County of Harris:

In the District Court of Harris County, Texas, — Judicial District,
— Term, 1906.

To the Honorable District Court of said County :

Now come Felix Gross and Theresa Gross, husband and wife, both of whom reside in Harris County, Texas, and are citizens thereof, who will be the plaintiffs herein, and complain of the Texas & New Orleans Railroad Company, the Louisiana Western Railway Company and the Southern Pacific Company, defendants herein, and respectfully represent that the defendant, Texas & New Orleans Railroad Company is a railroad corporation, duly and legally created and existing under and by virtue of the laws of the State of Texas and that the defendant Louisiana Western Railway Company is a foreign corporation, domiciled in the State of Louisiana, owning and operating an extensive line of railway and doing business and having a local agent resident in — upon whom service of citation may be had in this suit; and that the Southern Pacific Company is a foreign corporation operating a system of railways including the lines owned by the Texas & New Orleans Railroad Company and Louisiana Western Railway Company. That the defendant, Texas & New Orleans Railroad Company owns and operates an extensive line of railway in Harris County, Texas, and is doing business and has a local agent resident in said county, upon whom service of citation may be had, and for cause of action respectfully represents:

I.

208 That heretofore, to-wit, on or about June 1st, 1905, said defendants were engaged in some kind of a joint partnership arrangement between themselves, the exact details of which are unknown to plaintiffs, by which arrangement, among other things, the large majority of the stock of the defendants is owned or controlled in common by certain persons directing their affairs; that they solicit joint business and make through rates for the carriage of freight and passengers over both of said roads, and divide the profits arising therefrom, and operate said lines as one continuous consolidated line between Houston, Texas, and a point in the State of Louisiana, to-wit: La Fayette, and share between themselves the losses in operating said continuous line of railway, and use indiscriminately on one road or the other as occasion may require the engines, rolling stock and employes of each other, and each of them hiring and discharging employes for both of said lines of railway, and each of them requiring the employes engaged by it to render services on the line of the other company. That their employes operating trains are required to make the continuous run from Houston, Texas to La Fayette, Louisiana over the lines of both railways, though instructed to go through some formality of making out separate reports to each of the respective companies, which is

done solely for the purpose of defeating the jurisdiction of the state courts.

That on or about said date while defendants were operating under said arrangements, plaintiffs' son, to-wit: Corley Gross, deceased, was in the employ of defendants in the capacity of fireman on a locomotive of a passenger train on the run from Houston, Harris County, Texas, through Calcasieu Parish, to La Fayette, Louisiana. That on or about said date, said Corley Gross had left Houston with said train, about seven twenty P. M. on the night run, and had arrived or proceeded to within about seven miles of Sulphur Mines, Louisiana, at about eleven forty P. M., and was proceeding at the usual rate of speed when the engine struck a beef or other animal lying on the track, and the engine and several cars were thereby derailed and turned over, and as a result thereof a great quantity of
 209 steam or hot water or hot oil confined about said engine, was permitted or caused to escape and plaintiffs' said son Corley Gross was thereby scalded and burned to such an extent, that he died therefrom about two weeks later. That the said Corley Gross was burned and scalded on the head, face, neck, arms and body in the most horrible manner, and the flesh thereof was cooked and caused to fall from the bones, and that for about two days prior to his death he was caused thereby to suffer great physical pain and mental anguish, and that he lost or was deprived of the possibility of making future earnings as well as all other benefits of life.

II.

Plaintiffs allege that the death of their said son was directly and proximately caused and occasioned by the negligence and carelessness of the defendants, their servants, agents and employes, in the following respects, to-wit:

(a) In that they negligently and carelessly permitted cattle to get and remain upon defendants' right of way and upon their track, in said Calcasieu Parish, Louisiana, and thereby caused said derailment;

(b) In that, their right of way was not kept properly enclosed, and the gates of the enclosure properly closed, so as to prevent cattle from getting upon said right of way and track;

(c) In that, defendants knew or had notice of such defective conditions of their enclosures and that said beef or animal as well as others were upon their right of way and track several hours before the accident, or it was their duty to know it, and negligently failed to remove the same.

That plaintiffs' son did not know that said cattle would be permitted to get and remain upon said right of way and track, and cause said derailment and that plaintiffs' son was injured without fault or neglect on his part.

(c) In that, the ties supporting the rails at the place of said accident were old, rotten and defective and permitted the rails
 210 to spread and said engine to leave the track and turn over as aforesaid.

III.

Plaintiffs allege that the said Felix Gross is the father and Theresa Gross is the mother of said Corley Gross deceased. That the said Corley Gross had no wife nor descendants. That said Felix Gross was — years of age and said Theresa Gross was — years of age, and that their said son Corley Gross, deceased, at the time of his death was a strong and healthy man, twenty years of age, and earning and capable of earning one hundred dollars per month, of which amount more than seventy dollars per month was contributed to the support of his said father and mother, and he would continue to have contributed said amount to their support as long as they both lived, or either of them. That said Corley Gross left no widow nor children surviving him, having died unmarried. That by reason of the death of their said son these plaintiffs have suffered a pecuniary loss in the sum of twenty five thousand dollars. That by reason of said injuries to said Corley Gross and his losses occasioned thereby he was damaged in the amount of twenty five thousand dollars.

Plaintiffs further say that under the Statutes of the States of Texas and Louisiana the cause of action which Corley Gross had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein.

The premises considered, the plaintiffs pray that the defendants be cited to answer this petition, and that upon final hearing they have judgment against the defendants for the amount of their said damages, as aforesaid, for all costs of suit, and for general relief, and for such they will ever pray.

(Signed)

LOVEJOY & PARKER,

Att'ys for Plaintiffs.

Endorsements: No. 39491. In the District Court of Harris County, Texas, 55th. Judicial District. Felix & Theresa Gross, Plaintiffs vs. T. & N. O. R. R. Co., et al., Defendants. Plaintiffs' Original Petition. Filed March 31st, 1906. Henry Albrecht, C. D. C. H. C. by W. A. Powers, Deputy."

The defendants here rested.

The Plaintiffs' Evidence Offered in Rebuttal.

The plaintiffs offered and introduced in evidence the following testimony of the witness HENRY P. DART, taken by depositions:

"The local statute which governs actions for personal injury is as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language:

Article 2315: Obligation to repair damage caused by wrongful acts; survivorship of action. "Every act whatever of man that

causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code

212 however contains nine articles on the general subject, which in Louisiana goes by the title of "Offences & Quasi Offences," the Articles being 2315 (already cited) to 2324 (inclusive), which articles I append to this answer, omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed before you. Of course, these articles have been the subject of judicial construction and interpretation for many years and the decisions are, from my point of view, 'law or authority' under the Code, and you will so understand my answer.

The Articles above mentioned are as follows:

Article 2316. Negligence, Imprudence, or Want of Skill: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317: Liability for acts of others and things in our charge: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

Article 2320: Acts of Servants, etc.: "Masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

In the above cases responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it."

Before the adoption of the amendment of 1884 these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. *Vredenburg vs. Behan*, 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created 'an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation.' *Van Amberg vs. R. R. Co.* 37 La. An.

213 652. *Eichorn vs. R. R. Co.* 112 La. 250; 36 S. R. 335.

Therefore as the law stood at the date of this accident and as it now stands, the survivor may recover:

(1) The damages the decedent might have recovered had he

lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see *Eichhorn vs. R. R. Co.* 114 La. 718 et seq., 38 S. R. 526; *Payne vs. Lumber Company* 117 La. 991; 42 So. Rep. 475; *Dobyns vs. R. R.* 119 La. 82; 43 So. Rep. 934.

(3) To these elements the court has now added recovery for mental suffering of the survivor. See *Stewart vs. R. R.* 112 La. 767; 36 So. Rep. 676 as applied in *Graham vs. Telegraph Company* 109 La. 1070, 34 So. Rep. 91; *Parker vs. Lumber Co.* 115 La. 463, 39 So. Rep. 445, and note the qualification in *Brinkman vs. Oil Co.* 118 La. 846, 43 So. Rep. 458.

(4) Vindictive or punitive damages are not permitted in actions for personal injury against a corporation. *McGary vs. City*, 12 Rob. (La. Reports) 675. *McFee vs. R. R. Co.* 42 La. An. 790. *Patterson vs. R. R. Co.* 110 La. 797, 34 So. Rep. 782 and *Parkerson* case 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. *Huberwald vs. R. R. Co.* 50 La. An. 477, 23 So. Rep. 474. In *Eichhorn vs. New Orleans & Carrollton R. R. Co.* 114 La. 712, 38 So. Rep. 529-531, you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached majority since then. The age of majority in Louisiana is 21 years. Where the action runs in favor of minors the damages are apportioned according to their respective majorities. See 214 *Eichhorn's case* 114 La. at p. 726.

(6) Children under the code of Louisiana, Article 229 'are bound to maintain their father and mother and other ascendants who are in need,' on the other hand the child under Article 216 of the Civil Code remains under the authority of his parents until his majority:

There is also further provision, Articles 230-231, defining alimony as 'what is necessary for the nourishment, lodging and support of the person who claims it.'

In *Myhan vs. Electric Co.* 41 La. An. 969, the parents claimed for the death of a son of eighteen years. The court referring to his duty said: 'The probability is that as he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities, etc.'

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question Six subsection (b) must be answered in the affirmative. In the *Myhan* case the court allowed

\$2000.00 for the death, as a sum that would relieve the parents 'for a while to some extent from the immediate consequences attending the severe injury inflicted on them.'

The Supreme Court of Louisiana has decided that the restrictive clause of Article 2320 has been read out of the Article as the result of the jurisprudence of this State:

As to this it is said in *Weaver vs. Goulden*, 116 La. 473, 40 So. Rep. 798, as follows: 'As to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents.' And further it is said: 'Even as between individuals this restriction has been virtually ignored in the latter decisions of this court.'

215 On the 1st of June 1905 and for many years prior thereto the statutory authority for an action for personal injuries by the servant against the master was the articles 2317 and 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter.

In a trial before a jury under the practice in Louisiana, the jury is the judge of both fact and law. They are sole judges of the facts and are supposed to take the law from the court. The trial judges discuss in the charge the evidence only in a most general way, and they make no attempt to influence the jury by their opinion in reference to the evidence. They confine themselves as a rule to general references and to the general rules of law which would aid the jury in finding the truth. The result is that a trial before a jury up to the moment of the verdict, is more like a hearing before an Examiner in Chancery, than anything else I can think of.

The jury in a civil cause is composed of twelve members, nine of whom may find a verdict.

The trial judge has the right to set aside the verdict of the jury, if he disagrees with its conclusions on the facts or on the amount of damages awarded. There is no limit to the judge's right to set aside the verdict, when he is not in accord with it on either ground. See: *State ex rel. Snider* 47 La. An. 1482. In other words the trial judge may grant as many new trials as he sees fit. In the case just quoted, three successive verdicts in favor of the Plaintiff were set aside by the trial judge and an attempt was made to mandamus him in the Supreme Court, to compel him to sign one of those judgments, and it was held that the Supreme Court had no power to do so. On the other hand the trial judge may force a remittitur under pain of new trial if he considers the verdict excessive and there is no power to interfere with his conduct in this respect. *Landry vs. Ship Co.* 112 La. 515, 36 So. Rep. 548.

The Supreme Court and other appellate courts of Louisiana examine the evidence in all cases, including those in actions
216 for personal injury and decide upon the facts, as they find them, without reference to the verdicts of juries. In other words, the verdict of a jury, particularly in cases of that nature against corporations, has no sacramental weight and is not regarded as a final finding of facts. All the evidence is carried before the ap-

pellate courts for reexamination and review. *Warner vs. Talbot*, 112 La. 831, 36 So. Rep. 743—*Schlater vs. Wilbut* 41 La. An. 406—*Wood vs. Jones* 34 La. An. 1086.

I should hesitate to say that the word 'fault' used in the Louisiana Statute means substantially the same as negligence or carelessness in common law, for the reason that our court has displayed a disposition to release the defendant or condemn it where the fault was slight on either side, as the facts might be.

Substantially the word 'fault' as a rule means, under our law, such active or passive conduct as has brought about the injury in question.

I think the aim of our Louisiana Statute is to give pecuniary compensation for the loss sustained.

I have read the case of *Cox* 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original.

Concerning the remainder of the question, I do not think I am called upon to express an opinion, as I know nothing of the settled public policy of Texas. The Statutes as printed do not seem to me to be other than as suggested by the opinion. The Special Act of 1878 creating the Louisiana Western Railroad Company does not seem to have been one of the issues in that case.

The Statutory law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish to employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work and reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and

there existing, and the knowledge of the employee of the same, 217 and a failure to do so would constitute 'fault' within the meaning of this statute and such fault would be negligence within the meaning of the law. *Woods vs. Jones* 34 La. An. 1086—*Gusman vs. Caffery Co.* 49 La. An. 1264; 22 So. Rep. 742; *Henry vs. Lumber Co.* 48 La. An. 950; 20 So. Rep. 221; *Smith vs. Sellars*, 40 La. An. 527; — So. Rep. —.

I refer you to the cases cited and also to *Van Amberg vs. R. R. Co.* 37 La. An. 650—*Wallis vs. Morgan's L. & T. R. R. Co.* 38 La. An. 156—*Gusman vs. Caffery Co.* 49 La. An. 1269-70; 22 So. Rep. 742—*Jones vs. Ry. Co.* 51 La. An. 1247—*Merchant vs. Price Woods Co.* 107 La. 563—*Fuller vs. Tremont Co.* 114 La. 267, 38 So. Rep. 164—*Harris vs. Lumber Co.* 115 La. 977, 40 So. Rep. 374.

I think that the case of *Roff vs. Summit Lumber Co.* 44 So. Rep. 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of *Bell vs. Lumber Company* 107 La. 731, 31 So. Rep. 994—*Stucke's case* 23 So. Rep. 342—*Merritt's case* 35 So. Rep. 499, *Evans case* 35 So. Rep. 736 and *Duncan vs. R. R.* 51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject matter."

In this connection the plaintiffs further offered and introduced in evidence, in connection with the answers of the said witness Dart

introduced by them, the several decisions and statutes cited and referred to in said answers.

The plaintiffs further offered the following decisions and reports of adjudicated cases, to-wit:

Whitworth vs. Lumber Co., 46 So. Rep., 912.

Taylor vs. Company, 46 So. Rep., 703.

Day vs. Louisiana Western Railroad Co., — So. Rep., —.

Cox vs. Ry. Co. (U. S. Sup. Ct.) —.

It was here agreed in open court by and between the counsel of all parties, and with the consent of the presiding Judge.
218 that the various decisions and adjudicated cases and the reports thereof, as introduced in evidence by each of the parties and their counsel, need not be read or literally copied in the record, but that the publications of such statutes and any printed and authentic copies thereof issued under the authority of the State of Louisiana, should be deemed and might be referred to as part of the record in the cause, and that any reports of said decisions and adjudicated cases as printed and published in the Court Reports of the State of Louisiana, or the Southern Reporter, or the Federal Reporter, should be deemed sufficient for the purpose of reference in considering and deciding the questions involved in this cause.

In the District Court of Harris County, Texas, 11th Judicial District.

No. 37282.

FANNIE L. MILLER et al.

vs.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

It is hereby agreed by and between the parties, plaintiffs and defendants, in the above entitled and numbered cause, that the above and foregoing 107 pages of manuscript contain a true, full and correct statement of all facts proven upon the trial of said cause.

S. H. BRASHEAR,

LOVEJOY & PARKER,

Attorneys for Plaintiffs.

LANE, JACKSON, KELLEY &
WOLTERS,

*Attorneys for Defendant Texas & New
Orleans Railroad Company.*

LANE, JACKSON, KELLEY &
WOLTERS,

*Attorneys for Defendant
Louisiana Western Railroad Company.*

219 The parties plaintiffs and defendants in the cause No. 37282, entitled Fannie L. Miller, et al., vs. Texas & New Orleans Railroad Company et al., having agreed to the above and fore-

going statement of facts, the said statement is hereby approved and ordered filed as a true, full and complete statement of the facts proven on the trial of said cause.

This 18th day of Feb. 1909.

CHAS. E. ASHE,
*Judge 11th Judicial District Court,
 Harris County, Texas.*

(Endorsed:) No. 4410. Filed in Court Civil Appeals, Apr. 21, 1909. H. L. Garrett, Clerk. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 12, 1910. Jos. Murray, Clerk. Filed Feb. 18th, 1909. Henry Albrecht, Clerk District Court Harris County, Texas, By Frank H. Meyer, Deputy.

Copy of Orders of Court of Civil Appeals, at Galveston.

Be it remembered: That at a term of the Honorable Court of Civil Appeals of the State of Texas, begun and holden at Galveston, on the 4th day of October, A. D., 1909, present R. A. Pleasants, Chief Justice, and Associate Justices T. S. Reese and S. A. McMeans;

No. 5252.

T. & N. O. R. R. Co. et al., Appellant,

—
 FANNIE L. MILLER et al., Appellee.

the following Orders were made:

FEB. 9, 1910.

In compliance with an order of the Supreme Court of Texas, dated Feb. 2, 1910, it is ordered that this cause be transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District at San Antonio, and that the Clerk of this Court certify all
 220 orders made and costs accrued in this Court, and transmit all records and papers in this cause to the Clerk of said Fourth District."

I, H. L. Garrett, Clerk of the Court of Civil Appeals of Texas, at the City of Galveston, hereby certify that the foregoing is a true copy of the Orders made herein by this Court in the above entitled and numbered cause as appears of record.

In witness whereof, I hereunto set my hand and affix the seal of said Court at Galveston, this Feb. 9, 1910.

[SEAL.]

H. L. GARRETT, *Clerk.*

(Endorsed:) No. 4410. T. & N. O. R. R. Co. vs. Fannie L. Miller. et al. Copy of Orders of Court of Civil Appeals at Galveston. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 12th, 1910. Jos. Murray, Clerk.

TEXAS & NEW ORLEANS R. R. Co. et al., Appellants,
vs.

FANNIE MILLER et al., Appellees.

Appeal from Harris.

The statement of the nature and result of the suit as made in appellants' brief is acquiesced in by the appellees; and is adopted by us. It is as follows:

"The appellee, Fannie L. Miller, surviving wife of William T. Miller, deceased, suing for herself and for the use and benefit of the minors, G. W. Miller, William D. Miller, and Dorace H. Miller, brought this action in the District Court of Harris County, Texas, for the death of her husband, William T. Miller, June 1st, 1905, while he was operating a locomotive engine drawing a passenger train, near the station known as Sulphur, on the line of the Louisiana Western Railroad, in the State of Louisiana, by reason of the derailment of said train.

The first amended original petition, filed May 25th, 1908, alleged substantially that the defendant Texas & New Orleans Railroad Company owned and operated a line of railroad from Houston, in Harris County, Texas, to the town of Echo, in the State of Texas; and that the defendant Louisiana Western Railway Company operated a line of railroad from La Fayette, in Louisiana, to said town of Echo; and that, on and prior to the date of the injury complained of, the deceased, William T. Miller, as a locomotive engineer, was in the employment of both the defendants, and that the said defendants operated their respective lines jointly, so that the deceased was required to operate engines over both of the lines continuously between Houston, Texas, and La Fayette, Louisiana, and that said deceased, together with other employes in such business, was subject to be discharged by either of the said defendants, and that the said defendants were virtually and practically partners in the conduct of said business; that the railway of the Louisiana

Western Railway Company ran through a country in which
222 there were great numbers of cattle, and which habitually grazed upon the right of way and track, and were a great menace to the safety of trains, and that in the exercise of ordinary care the said defendant company had constructed fences along the lines of its right of way so as to enclose said railroad track, and that the deceased and other employes of defendants looked to the defendants to use ordinary care in keeping the said fences in proper condition, so as to avoid collision between the trains and the cattle; that on the date of the alleged injury, while deceased was operating his locomotive and drawing a passenger train from Houston to La Fayette over said railway, and near the station of Sulphur, in the State of Louisiana, and at night, the locomotive came in contact with a cow, and was thereby derailed, as a result of which William

T. Miller, the engineer, was seriously injured, and thereafter died as result of such injuries. The plaintiffs alleged negligence on the part of defendants, and each of them, in several particulars, which it is deemed unnecessary at this point to detail, and prayed for judgment in the sum of thirty thousand dollars.

The defendant Louisiana Western Railway Company filed its answer, setting forth the following defensive matters: (1) a plea in abatement and to the jurisdiction of the court, alleging that the injury and death for which the suit was brought occurred entirely within the State of Louisiana and beyond the limits of the State of Texas, and that the right of action and remedies (if any) in favor of plaintiff, were governed and regulated by the laws of Louisiana on the subjects involved, and that the laws of Louisiana, both with regard to the right of action itself and the remedies and measure of damages and defense involved, were conflicting and inconsistent with the laws and policies of the State of Texas, to such extent that it was contrary to the law and the comity between the States for the courts of Texas to take cognizance of, or entertain jurisdiction in, said cause for the purpose of administering the laws of Louisiana applicable thereto; (2) a general demurrer; (3) general denial; (4) contributory negligence; (5) that the negligence (if any) causing the derailment and injury and death of deceased, was that of a fellow-servant; (6) that the injury resulted from a risk assumed by deceased as incident to the service and known to him; (7) that the act of the Louisiana State Legislature incorporating the Louisiana Western Railroad Company had granted it special immunity and exemption from any liability or responsibility for injuries to those in its employment operating trains, and that the said defendant, by accepting and acting under the charter, with the said provision of immunity therein, acquired vested contract rights from the State, and the legislation subsequently enacted for the purpose of creating actions for injury resulting in death in the State of Louisiana, and which right of action was depended upon as the basis for recovery against said defendant in this cause, was an attempt to impair the obligation of a contract, and hence void, under the Constitution of the States of Louisiana and Texas and of the United States; and (8) a plea in bar of the action, that the laws of Louisiana applicable to the right of action (if any) sought to be enforced and the remedies therefor and the defenses thereto were radically in conflict with the laws and policies of the State of Texas.

The defendant Texas & New Orleans Railroad Company filed its amended answer containing substantially the same defenses as those asserted by its co-defendant, Louisiana Western Railroad Company, above recited, and embraced in addition thereto a special plea, verified by oath, denying the allegations in plaintiff's petition with reference to the existence of a partnership relation between the two defendants in the operation of their respective railroads.

The pleas in abatement and to the jurisdiction of the court, with evidence in support thereof, were duly submitted to the court on

January 30th, 1909, and on the same date overruled, to which rulings the defendants each excepted; and thereafter, on the same date, the general and special demurrers of each of the defendants also were overruled.

Afterwards, on the same date, January 30th, 1909, the cause was tried on its merits before the judge and without a jury, and judgment was rendered in favor of the plaintiffs, against the defendants, jointly and severally, for the sum of sixteen thousand dollars, apportioned as follows:

| | |
|-------------------------------------|------------|
| To Fannie L. Miller, the widow..... | \$8,000.00 |
| To George W. Miller..... | 2,000.00 |
| To William D. Miller..... | 2,500.00 |
| To Dorace H. Miller..... | 3,500.00 |

The court, in connection with such judgment, upon request, filed his conclusions of fact and law, and to this judgment, and to each and all of the conclusions, the defendants, and each of them, then and there excepted and gave notice of appeal, and said exceptions were duly entered upon the judgment record, and upon application of the parties a period of twenty days from and after the adjournment of the term of court was allowed for filing statement of facts and bills of exception."

From the judgment the defendants prosecute this appeal.

The first assignment complains of the court's overruling the plea of each defendant in abatement and to the jurisdiction of the court.

The proposition advanced under the assignment is as follows:

"A suit or action instituted in the courts of Texas on a cause of action growing out of injury in the State of Louisiana, resulting in death, must be tried, if at all, according to the laws of the State of Louisiana; and when the laws of said State applicable thereto, either as to the right or remedy or defense, are essentially different from those of this State, the courts of Texas will not entertain jurisdiction of such suit or action."

It is said by Wharton on Conflict of Laws (3 ed. § 480a), "It is now established by the overwhelming weight of authority that a statute creating a cause of action for damages sustained by the relatives or next of kin of the deceased is not penal, and that the cause of action is transitory, and may therefore be enforced in any state or country whose public policy is not opposed to the recognition and enforcement thereof."

In a note illustrating the part of the text quoted, it is shown that, while *Willis v. M. P. R. Co.*, 61 Tex. 432 contains expressions apparently in conflict with the general principle stated, it was not involved, nor such expressions necessary to the decision of the case, there being no statute of Indian territory creating such right of action shown. It is further observed that "Subsequent cases in Texas have treated the general question as an open one, though they have denied jurisdiction upon the ground of the dissimilarity of statutes (*Texas & P. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627; *St. Louis, I. M. & S. R. R. Co. v. McCormick* 71 Tex. 668, 1 L. R. A. 804, 9 S. W. 450), or upon the ground that the

statute of Texas did not apply to torts occurring outside of Texas (De Harn v. Mex. Nat. R. R. Co. 86 Tex. 68, 23 S. W. 381)."

The correctness of the observation is thus shown:

In Texas & P. R. Co. v. Richards, *supra*, the right to maintain in this state an action for the death of a person arising under the statute of another state, was denied upon the ground that there was no similar statute here, but the court said that it seems to be generally held that the right given by the statute of one state will be enforced in the courts of another state giving a like right of action under the same facts.

In St. Louis, I. M. & S. Ry. Co. v. McCormick, *supra*, the refusal to entertain the action was expressly put upon the ground of the dissimilarity between the statute of Arkansas under which the cause of action arose, and the statute of Texas, and the court observed that the utterance of Chief Justice Willie in Willis v. M. P. Ry. Co. 61 Tex. 432, were neither adopted nor repudiated, but that the main question was left open, as in Tex. & P. R. Co. v. Richards.

In De Harn v. Mex. Nat. Ry. Co. 86 Tex. 68, 23 S. W. 381, the court alluded to the fact that it had been held that if the law of the state where the injury was inflicted gave substantially the same right of action which was given by the law in the state where the suit was brought and in favor of the same parties, by reason of the principle of comity, the right will be enforced in the latter state, but says that the question was left open in St. Louis, I. M. &

S. Ry. Co. v. McCormick. The court, however, did not pass upon the question. See also Cooper v. G. C. & S. F. Ry. 93 S. W. 201.

It seems that the question, as to whether an action for damages for injuries resulting in death created by the statute of another state where the injury occurred can be maintained in Texas, has never been directly decided; and that, while such actions have been brought, they have always failed on account of the dissimilarity of the laws of the jurisdictions where the injuries occurred and the statute of this state which gives such right of action. Though it seems that the leading of the supreme court is towards the rule above quoted from Wharton, where there is no such dissimilarity of the statute which gives the action where such injury was inflicted from that of this state, which confers the right, as prevents the right given from being substantially the same in one jurisdiction as in the other. It is, however, in such a case, the statute of the state creating the right of action, not ours, which must be looked to and be enforced, not as obligatory on our courts, but purely as a matter of comity due by one state to another.

As is said by Wharton on Conflict of Laws (vol. 2, § 480b): "The existence of a statute of the forum substantially like the foreign statute under which the cause of action arises is, of course, the best and most conclusive indication that it is not contrary to the public policy of the forum to entertain the action; and the majority of cases either hold or assume that there must be such a statute at the forum in order to uphold the jurisdiction of a cause of action arising under the foreign statute. * * * Assum-

ing, however, that the existence of a statute of the forum similar to that of the state or country where the cause of action arose is a condition of the jurisdiction, it is not essential that the statute be precisely the same. It is sufficient if they be substantially alike, or of the same import and character."

If, then, upon examining the statute of Louisiana upon which plaintiffs' cause of action, if any they have, must necessarily rest, it should be found essentially different from ours which confers a right of action in cases of personal injuries resulting in death, we shall, like the Supreme Court has done, in the cases referred to, leave the question still open; for we have no desire to anticipate that Court in closing such a question.

The witness, H. P. DART, after qualifying as an expert upon the laws of Louisiana, testified, in response to interrogatories, as follows:

In response to direct interrogatory No. 4:

"The law of Louisiana confers a right of action for personal injuries inflicted by the wrongful conduct of another. In case of death the action survives for one year from the death, in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them. This action does not survive in favor of any other relative. It has been decided, for instance, that grand-parents are excluded from its benefits. The remedy thus afforded is statutory and appears in slightly different form in the earliest Code of Louisiana (See Digest of the Civil Laws, etc., published in 1808, Sec. II, Art. 16, p. 320), and has been amended from time to time and is now known as Article 2315 of the Revised Civil Code of Louisiana of 1870, which is the date of the last general revision of the Civil Code of Louisiana. This article has been amended by the legislature of Louisiana since the date mentioned, the most recent amendment being that of 1884, so that the article now reads as hereinafter set forth."

Referring to the statute as it exists today in the State of Louisiana, and existed at the time of the injury and death of Miller and Gross, the witness said:

"As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language:

"Article 2315. Obligation to Repair Damage Caused by Wrongful Acts; Suretyship of Action.—Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive, in case of death, in favor of the minor children or widow of the deceased, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be.' * * *

The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an

action in the courts of Louisiana, other than the article of the Civil Code aforesaid, and the amendments thereto. The Civil Code, however, contains nine articles on the general subject, which in Louisiana goes by the title of 'Offences and Quasi Offences.' "

Continuing, the witness further says:

"Before the adoption of the amendment of 1884 these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. Citing *Vredenburg v. Behan*, 33 La. An., 643.

After the passage of the act of 1884, the court declared that the act created 'an obligation, by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation.' Citing *Van Amberg v. R'y Co.* 37 La. An., 652; *Eichorn v. R. R. Co.*, 112 La., 250; 36 S. R. 335."

The witness H. P. Dart, referring to the measure of damages in the State of Louisiana allowable under the amended act of 1884 of that State for injuries resulting in death, says:

"Therefore, as the law stood at the date of this accident, and as it now stands, the survivors may recover:

(1) The damages the decedent might have recovered, had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

229 On both propositions see: *Eichorn v. R. R. Co.*, 114 La., 718 et seq., 38 S. R. 526; *Payne v. Lumber Co.*, 117 La. 991, 42 S. R. 475; *Dobyns v. R'y Co.*, 119 La., 82, 43 S. R., 934.

(3) To these elements the court has now added recovery for mental suffering of the survivor. See *Stewart v. R. R. Co.*, 112 La., 767, 36 S. R. 676, as applied in *Graham v. Telegraph Co.*, 109 La., 1070, 34 So. Rep., 91; *Parker v. Lumber Co.*, 115 La., 463, 39 S. R., 445, and note the qualification in *Brinkman v. Oil Co.*, 118 La., 486, 43 S. R., 458.

(4) Vindictive or punitive damages are not permitted in actions for personal injury against a corporation. *McGary v. City*, 12 Rep. (Louisiana Reports), 675; *McFee v. R. R. Co.*, 42 La. An., 790; *Patterson v. R'y Co.*, 110 La., 797, 34 S. R. 782; and *Parkerson case*, 115 La., 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. *Huberwald v. R. R. Co.*, 50 La. An. 497, 23 S. R., 474. In *Eichorn v. New Orleans & Carrollton R. R. Co.*, 114 La., 712, 38 S. R. 529-531, you will find that the child's right of action was recognized, where the child, being a minor at the date of the accident, had reached majority since then. The age of majority in Louisiana is twenty-one years. Where the action runs in favor of minors, the damages are apportioned according to their respective majorities. See *Eichorn's case* 114 La., 726.

(6) Children, under the code of Louisiana, Article 229, 'are

bound to maintain their father and mother and other *descendants* who are in need'; on the other hand, the child, under Article 216 of the Civil Code, remains under the authority of his parents until his majority.

There is also further provision, Articles 230-231, defining alimony as 'what is necessary for the nourishment, lodging and support of the person who claims it.'

In *Myhan v. Electric Co.*, 41 La. An., 969, the parents claimed for the death of a son of eighteen years. The court, referring to
230 his duty, said: 'The probability is, that he was a robust young man, attentive to his duties, and kind to his parents; he would have advanced in life, and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities, etc.'

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe, or that they could expect from a minor."

Under our statute the action given is for the sole and exclusive benefit of the surviving husband, wife, children and parents of the deceased. Under that of Louisiana it is in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them. Hence these differences are apparent from the faces of the respective statutes: (1) Under the one all the children of the deceased, whether minors or adults, are given the right of action; under the other the children to whom the right is given are only the minors. (2) By that of Texas the parents of the deceased can recover, as well as his wife and children; under that of Louisiana they are given the right of action only in default of minor children or widow of the deceased.

That a different law of distribution prevails in different jurisdictions does not prevent the maintenance in one jurisdiction of a cause of action for death arising under the statute of another jurisdiction, since the distribution is to be made according to the law of the state where the cause of action arose, and the courts of the forum can see that the distribution is so made. *Dennie v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439; *McDonald v. McDonald*, 96 Ky. 209, 28 S. W. 482; *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 15 L. R. A. 583, 14 S. E. 838. As the plaintiffs in this case would, under the statute in this state, had the cause of action arisen here, have been entitled to
231 recover, it can make no difference that others could also have recovered, since the amount recovered is distributed by the judgment to the persons entitled to take under the law where the cause of action arose. Since the surviving wife and minor children of the deceased could have recovered under our statute had the accident occurred in this state, we are unable to perceive how it could be against public policy to prevent them recovering in our courts under the law of Louisiana which gives them the same right of action, though it withholds from others rights they would have had if the cause of action had arisen in this jurisdiction.

The weight of authority is against the view that dissimilarity affecting persons, by or for the benefit of whom the action may be maintained, and the proportion in which the fund recovered shall be distributed, will defeat the jurisdiction. *Boston & Atl. M. R. Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. 934; *Davidow v. Penn. R. Co.*, 85 Fed. 943; *Sloekman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Wooden v. Western N. Y. & P. R. Co.*, 126, N. Y. 10, 13 L. R. A. 458, 22 Am. St. Rep. 803, 26 N. E. 1050; *Boston & Main- R. Co. v. Hurd*, 56 L. R. A. 196, 47 C. C. A. 615, 108 Fed. 116; *Moore v. Powell*, 9 L. R. A. (N. S.) 1078; *Connor v. New York, N. H. & H. R. R. Co.*, 18, L. R. A. (N. S.) 1252, 68 Atl. 481, 28 R. I. 560; 2 Whart. Conf. of Laws § 480*b*, p. 1123.

There are other dissimilarities also as to the elements of damages apparent from the evidence quoted, e. g. in the jurisdiction where the cause of action arose damages for pain and suffering of the deceased are allowed which are not elements of damages in this state, unless the injured party had himself brought suit therefor, and after his death—such action surviving—it was prosecuted for such damages. This dissimilarity, however, will not defeat the jurisdiction of the courts of this state. *Boyle v. Southern R. Co.*, 73 N. Y. Supp. 465. But, upon examination of the authority (*Payne v. Georgetown Lumber Co.*, 117 La. 991, 42 So. 475) upon which the expert witness, Dart, bases his opinion that the survivors "may recover the damages decedent might have recovered, had he lived

such as compensation for his pain, for loss of wages or earnings during the time intervening from the accident until his death, for his disfigurement, and for his illness, it does not appear that the law of Louisiana, in regard to such items of damages, is substantially different from our own. That was a suit originally brought by Payne, the injured party himself, for such damages. Pending the suit the original plaintiff died, and, as his right of action survived under the law of Louisiana—as such an action does in this state—his widow and minor children made themselves parties plaintiff to the suit and prosecuted it to judgment recovering such damages as he would have been entitled to obtain had he survived. Such a recovery could have been had under the laws of this State had the injuries occurred here. *G. H. & S. A. Ry. v. Heard*, 91 S. W. 371. There is nothing to indicate that such damages are recoverable in Louisiana in a case where the deceased did not survive his injuries.

Again, "the loss by deprivation of decedent's society and his aid and support" as items of damages when considered in the light of the opinion (*Eiehorn v. N. O. & C. R. Light and Power Co.*, 114 La. 718, 38 So. 526) upon which the opinion of the witness, that such damages are recoverable, is based, are not different from what is recoverable by minor children under the laws of Texas for the wrongful death of their parents. That was a suit by minor children alone, the wife having in a prior suit recovered her damages for their father's death, and it was held that the object of the law, so far as the children are concerned, "was to save them harmless during their minority from the loss of the benefits (material and moral) which

they would have received had their father lived up to the time of their respective majorities to provide for their temporary needs—to tide them over to majority under as favorable conditions as they would have been tided over had their father not been killed.” See *G. H. & S. A. Ry. v. Davis* 65 S. W. 217; *G. C. & S. F. Ry. v. Younger*, 90 Tex. 387; *G. H. & S. A. Ry. v. Lacy* 86 Tex. 244; *Beaumont Trac. Co. v. Dilworth*, 94 S. W. 353.

233

In Louisiana, in assessing damages for the death of her husband, the wife's distress and mental suffering inflicted by her deprivation of his companionship, are elements of damage to be considered. While no such elements of damages can be considered in cases where a cause of action for wrongful death arises in this state, no difficulty can be perceived in allowing and enforcing a judgment for such damages by the courts in Texas. While such are not regarded as elements upon which compensation for the loss of a husband can be based in this jurisdiction, yet there is another class of cases where distress and mental suffering, arising even from the temporary absence of the husband, through the negligence of a telegraph company in failing to properly transmit and deliver a telegram, are recoverable and compose the principal elements of the damages. Nothing deters our courts from assessing and enforcing a judgment for such damages; and, as a case of this character must be tried in accordance with the *lex loci delicti*, we do not think the difference in the laws of Louisiana and of Texas is so essential as to require our courts to withhold jurisdiction in such case. Under the law of both jurisdictions pecuniary compensation to the wife and children of the deceased is the purpose sought to be attained by their respective laws, in one certain matters are regarded elements of such compensation, while in the other they are not. That is all.

The case is not akin to that of *Mex. Nat. R. v. Jackson*, 89 Tex. 107. There the dissimilarity in the *lex loci delicti* and the *lex fori* was so great that a judgment rendered in accordance with the one could not be enforced under the other. But here the judgment can be rendered in our courts in accordance with the law of Louisiana and enforced under the laws of Texas just as well as any judgment rendered in accordance with its statutes can. We conclude, therefore, that public policy of Texas is not opposed to the recognition and enforcement of the law of Louisiana regarding cases of personal injuries resulting in death, there being no such essential difference in the laws of the respective states as would warrant either in withholding that comity due from one to the other.

234

The fact that the act incorporating the Louisiana Western Railroad Company contains a provision exempting that Company from liability for injuries such as were inflicted on the deceased, Miller, and on which this suit is based, offers no barrier to the courts of this state entertaining jurisdiction of this case, especially as to the Texas & New Orleans Railroad Company. It is a fundamental principle of law that one legislature cannot deprive another of the right, or restrain it in its duty, to legislate in the interest of the general public. No such surrender of legislative power can be tolerated unless authorized by the Constitution. It is the

rights of the general public, not of private parties as against the interest of the public, that must be conserved by legislation. The provision referred to in the charter of the La. W. Ry. Co. has never been invoked in the jurisdiction of its enactment to shield it from its liability for injuries such as are shown to have been inflicted in the case before us; nor, do we think, ever can be successfully. If force and effect should be given it, the consequence would be to prevent the legislature of a sovereign state from ever passing a uniform law holding railroads liable for wrongs such as are complained of in this case. The people, voicing the fundamental law of the realm, only can do this. The act of no one legislature can have the force and effect of the Constitution, which, in uttering the will of the people to legislatures says, "Thus far shalt thou go, but no further."

Nor does the fact that the fellow-servant doctrine obtains in Louisiana in cases of this character as at common law, offer any obstacle to the jurisdiction of our courts in cases like this. Such doctrine affects the remedy rather than the substantive right created by statute. That such doctrine once obtained in the state in its application to cases of personal injuries inflicted by the negligence of railroad companies, and still exists in other cases of negligence, shows that our courts have no difficulty in its application.

For these reasons we overrule the appellants' first assignment of error, and in doing so close for the time a question which has been opened and shut by the supreme court, as we dare say will be done again, *ad libitum*.

The second assignment of error, which complains of the court's overruling the general demurrer of each defendant to plaintiffs' petition, presents a more serious obstacle to the affirmance of the judgment than the one just disposed of.

It appears from the face of the petition that the deceased, William T. Miller, died from injuries inflicted upon him entirely in the State of Louisiana, and outside the limits of the state of Texas. There was no allegation in the petition of any law in the state of Louisiana conferring a right of action upon anyone for injuries resulting in death. The insistence of defendants is that in the absence of such an allegation no cause of action was shown by the petition. The general rule is that the right to recover damages resulting from personal injuries is governed by the law of the place where the injury was received. This well-established rule applies to actions brought to recover damages for injuries causing death. If, therefore, there is no legislation of the state where the injury causing death was inflicted, then no right of action exists. While, if the plaintiffs had pleaded that a cause of action for injuries resulting in death existed under the laws of Louisiana, the presumption might be indulged that the law there is the same as in this state; but we cannot perceive, in the absence of an averment of the existence of a law according such right of action, how its existence can be assumed. Such an assumption must be made, before it can be presumed that the law of another state is the same as ours. The rule is general, that in the absence of an express statute of the *Forum*

to the contrary, the court will not take judicial notice of the law of a foreign country. This principle applies to the laws of another State of the Union; in other words, the several states of the Union are foreign to each other for the purposes of this principle. When,

then, as in this case, the right of action necessarily rests upon
236 a foreign law, the existence of the law must be averred in order to disclose such right. When such an averment is made, the presumption in the absence of evidence to the contrary, that such law is the same as that of Texas is simply taken as proof of the averment, but it does not supply the averment as well as furnish the proof. But when the answer of defendants, which pleads the law of Louisiana upon which the action is grounded, is looked to and considered in connection with the averments in the petition this defect is cured. *Lyon v. Logan*, 68 Tex. 524; *Boettler v. Tindick* 73 Tex. 488; *Hill v. George* 5 Tex. 89; *Grimes v. Hagood* 19 Tex. 246; *Bourke v. Vanderlip*, 22 Tex. 222; *Gaston v. Wright* 83 Tex. 282; *Bank v. De Berry*, 105 S. W. 1000.

We, therefore, overrule appellants' second assignment of error. The effect of this ruling is to in like manner dispose of the third assignment, which complains of the court's overruling defendants' special exceptions to plaintiffs' petition, the ground of the exceptions being substantially that urged under their general demurrer.

Before proceeding to the consideration of the remaining assignments, we will state the conclusions of fact, which we adopt, of the trial court. They are as follows:

"1. That the plaintiff, Fannie L. Miller, is the surviving wife, and the plaintiffs, George W. Miller, William D. Miller and Dorace H. Miller, are the surviving children of William T. Miller, deceased, and the said plaintiffs and deceased, at the time of his death, on, to-wit, June 1, A. D. 1905, were citizens of the State of Texas, and resided in Harris County, in said State; that the defendants, Texas & New Orleans Railroad Company, hereinafter referred to as the "Texas Company," was, on said date, a railway corporation duly incorporated under the laws of the State of Texas, and owned, and for a long time prior thereto had owned, a line of railway extending from Houston, in Harris County, to the State line between Texas and
Louisiana; that the defendant Louisiana Western Railway
237 Company, hereinafter referred to as the 'Louisiana Company,' was, on said date, a railway corporation duly incorporated under the laws of the State of Louisiana, and owned, and for a long time prior thereto had owned, a line of railway extending from said State line opposite Echo to Lafayette, in the State of Louisiana, and that both said defendants on said date, and for a long time prior thereto, were jointly engaged in the business of operating the said railways as one continuous line from Houston, in said Harris County, Texas, to Lafayette, in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock, and employes of the other, as the business or convenience required, and each hired for and discharged employes in the said joint business, and the employes hired by one were required to perform, and did

perform, services on the railway of the other; that such employés made continuous runs on trains operating from Houston to Lafayette, and *vice versa*, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette, over said railways, as a continuous route, and were partners in such business, sharing in the profits and losses thereof.

2. That the railway of the Louisiana Company ran through a country in which there were numbers of cattle, and the said company fenced its right-of-way for the purpose of excluding cattle therefrom, and that the fences were effectual to exclude cattle from the right of way when ordinary care was used to keep them in proper repair, and when such care was used to keep the gates closed; and the employés operating trains over the said railway relied upon the companies to keep the fences in repair and the gates closed, to the end that they might not be exposed to the peril of injury or death by derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track.

3. That on, to-wit, June 1, A. D. 1905, the said deceased, William T. Miller, was in the employ of defendants in the capacity of engineer of locomotives drawing passenger trains operated by defendants over their said railways between Houston, in said Harris

County, Texas, and Lafayette, Louisiana, and was, on said
238 date, engineer of a locomotive drawing one of the defendant's passenger trains running from Houston to Lafayette over said railways, and that upon the train getting near a station known as Sulphur, in Louisiana, in the night time, the locomotive struck an animal of the cow species, and was thereby, together with a number of cars, derailed, and the said Miller then and there injured, so that as result thereof, he died.

"4. That, some hours previous to the derailment of Miller's locomotive, another of defendant's trains had struck and killed an animal of the cow species, near the place of the derailment; and the carcass was allowed to lie upon the right-of-way, within a short distance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right of way through the said gate, and were seen by employés of defendants in charge of one of the defendants' east-bound trains, gathered about the dead one, holding a 'ceremony' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right-of-way by the dead one; and I find that defendants knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open, cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified Miller of that fact, and in time to have had the said cattle removed from the right-of-way; and I find that it was the duty of defendants and the section men upon the section upon which the said cattle were, to have removed said cattle, or, failing so to do, that it was the duty of defendants to notify said Miller of the presence of said cattle upon the

right of way, and that they could have notified him, and in that case he would have been upon the lookout for said cattle, and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the said Miller notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Miller. And that plaintiffs were actually damaged by his death in the sum hereafter stated.

5. That there is a substantial similarity between the laws of Louisiana and the laws of Texas, giving right of action for injuries resulting in death, and, under the law of Louisiana, that Miller was not a fellow-servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death, and was in the exercise of ordinary care."

The fourth, fifth, sixth and seventh assignments and the propositions asserted thereunder all relate to the action of the court in admitting evidence as to what the statute law of Louisiana was in relation to actions for injuries resulting in death, the admission of such evidence being complained of upon the ground that there was no allegation in plaintiffs' petition authorizing thereof. Since, as we have held, the omission of such allegation was supplied by the defendants pleading such law, it follows that such evidence was properly admitted.

As to the provision in the legislative charter of the Louisiana Western Railway Company relieving the company from liability for injuries resulting in the death of its train operatives, we will remark that such provision was not, within the purview of Art. 10 § 1 of the Constitution of the United States, such a contract between the railroad company and the State of Louisiana as the State was inhibited from impairing an obligation. As before intimated, the power of the State to exercise its general legislative functions could not be traded or bartered away in any such manner. It is a general principle that the legislature cannot diminish the power of its successors by irrevocable legislation; for if it could, one legislature might so fetter its successors as to destroy the functions and powers of representative government. Railroad companies are public service corporations chartered, maintained and run in the interest of the public and can not break or be let loose from the power or control of the public without becoming the masters instead of the servants of the people. "Where the wicked rule, the people mourn." And groans of oppression come from the people, in tones louder than whispers, in those states where railroads dominate. It is not left to conjecture what the ruling of the supreme court of the United States would be, if a case arising under the Employers' Liability Act should come before it involving the question of immunity from liability claimed here by the defendant under its charter. That great and pure tribunal with one breath

ould blow it away as though it were but thistle down; and yet, an act of Congress can no more impair the obligation of a contract than can the act of a state legislature. The safety of passengers and expeditious carriage of freight depend, in a large measure, upon the preservation of the lives of the train operatives; and no better way has ever been devised to secure these ends than to hold railroad companies liable for the death of its train operatives resulting from the negligence of such companies. So an act creating such liability, though the damages are given to the members of the deceased's family, may be regarded, in one sense of the term, an exercise of the police power of the State—a power of which it cannot be divested by the legislator. If the constitution itself should endeavor to inhibit the exercise of such power, it would simply result, if heeded, in the destruction of the principal functions of government. So we take it, that if the provision in the charter ever had any force, it was in effect repealed by the act of 1884, giving certain persons a right of action for the death of a relative, caused by negligence.

What we have just said also disposes of the eighth assignment of error.

41 The ninth assignment of error complains that the court erred in that part of its first conclusion of fact commencing immediately after the clause, "and resided in Harris County in said state," and continuing to the end of said conclusion.

The facts embraced in the findings are shown by the undisputed evidence; and, so far as the liability of the defendants is concerned, can make no difference whether they establish a "partnership" in the legal sense of the term or not. For the facts found are such as make them jointly and severally liable for injuries inflicted by each other upon an employé of both while engaged in their common service.

The remaining assignments complain of the court's findings of fact and entering judgment upon them. The evidence supports the findings, and the facts found are sufficient to support the ultimate conclusions that the defendants were guilty of negligence and that such negligence was the proximate cause of Miller's death.

There is no error which requires a reversal of the judgment and it is affirmed.

H. H. NEILL,

Associate Justice.

Opinion delivered and filed May 4", 1910.

(Endorsed:) Filed in Supreme Court June 23, 1910, F. T. Connerly, Clerk.

242 *Judgment of Court of Civil Appeals.*

WEDNESDAY, May 4th, A. D. 1910.

No. 4410.

T. & N. O. R. R. Co., et al., Appellants,
vs.
FANNIE MILLER et al., Appellees.

Appeal from District Court Harris County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller do have and recover of and from the appellants Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, and their surety The United States Fidelity & Guaranty Company, the amount adjudged by the court below, and all costs in this behalf incurred, and this decision be certified below for observance.

Appellants' Motion for Rehearing.

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio.

No. 4410.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Appellants.
v.
FANNIE L. MILLER et al., Appellees.

To the Honorable Judges of said Court:

Now come the appellants, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in the above entitled and numbered cause, and make this their motion for rehearing, and ask the court to set aside its decision and opinion heretofore
243 rendered, delivered and filed in this cause May 4th, 1910, affirming the judgment heretofore rendered in this cause by the District Court of Harris County, Texas, and that the court grant appellants a re-hearing of said cause, for the following reasons, to-wit:

First.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the First Assignment of Error urged by appellants and presented on page 6 of their brief on file.

complaining that the trial court erred in overruling the pleas to the jurisdiction and in abatement of each of said defendants, as set forth in Section II of the Original Answer of the Louisiana Western Railroad Company and Section I of the First Amended Original Answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in defendants' bill of exception No. 1 referred to and made part hereof.

And in this connection the Honorable Court erred in the following conclusions of law: (1) that the right of action based and founded entirely on the statute law of Louisiana for injuries resulting in death was operative beyond the jurisdiction of that State, so as to be enforceable in the courts of Texas; (2) that the conflict and inconsistencies between the laws of the two states, as to the measure and elements of damages awarded for the injuries resulting in death, are not such as to preclude the courts of Texas from taking cognizance of the cause and administering the laws of the State of Texas by virtue of its statutes and the laws of Louisiana, on the subject of the fellow-servant doctrine, as a defense, is not such as to preclude the courts of Texas from taking a cognizance of such cause on the grounds of comity; and (4) that the special immunity vested in the Louisiana Western Railroad Company by its charter provision, whereby it is exempt from liability for such injury and damages as are involved in this cause, did not constitute such conflict

244 with the policies of the State of Texas as to preclude the courts of Texas from taking cognizance of said cause and administering the laws of Louisiana thereto, notwithstanding the pleading of such charter provision as a defense. And by this holding the Court places itself in position to question the validity of the said charter provision, as a legislative act of the State of Louisiana, and thus to refuse full faith and credit to the acts and proceedings of the State of Louisiana, thereby depriving appellants of a right, title, privilege and immunity under the Constitution and Statutes of the United States of America.

Second.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Second Assignment of Error urged on page 46 of appellants' brief, and the Third Assignment of Error, presented on page 67 of appellants' brief, both to the effect that the court erred in overruling and refusing to sustain the general demurrer of defendants, for the reason that the plaintiffs' petition, on which trial was had, while showing that the injury and death of Miller occurred entirely in the State of Louisiana and beyond the limits of the State of Texas, yet there is no reference to, nor declaration upon, any right of action afforded by the laws of Louisiana in behalf of the plaintiffs for such injury and death.

And in this connection the Honorable Court erred in holding that such deficiency of the plaintiffs' petition, making it bad on demurrer, was cured, for the purposes of demurrers, by the reference to certain laws of Louisiana set forth in the answers of defendants.

Again, if this Honorable Court be correct in holding that the deficiencies in the plaintiffs' petition, rendering it subject to de-

murrer, as conceded by the Court, were cured against such demurrer by the pleadings of the defendants referred to, then we insist that the Honorable Court erred in failing to find and hold that there was a departure from fact to fact, or at least from law to law, between the cause of action as set forth in plaintiffs' original petition and
 245 that sought to be relied upon for recovery as set up subsequently in defendants' answers such as to constitute a new and separate cause of action, (Ry. Co. v. Wyler, 158 U. S., 285-298; 39 L. Ed., 987; Whalen v. Gordon, 95 Fed. Rep. 314; Boston & Maine R. R. Co. v. Hurd, 56 L. R. A., 193; 108 Fed. Rep. 116; Anderson v. Wetter, 69 Atl. 105; 15 L. R. A. (N. S.) 1003; Phoenix Lumber Co. v. Houston Water Works Co., 94 Texas, 456); and that such answers, having been filed April 2, 1908, more than two years after the right of action, if any, accrued in the State of Louisiana, the right of action, if any, had become barred, under the two years statute of limitation of the State of Texas, which under the circumstances, was not required to be specially plead (Nelson v. Cooper, 108 Fed. Rep. 919; 48 C. C. A. 140; Himes v. Lumpkin, (T. C. A.) 47 S. W., 819; McSween v. Yet, 60 Texas, 183; Tazewell v. Whittle, 13 Gratt. (Va.), 329; Dreatzer v. Baker, 60 Wis. 179; 18 Cooper v. Lyons, 9 Lea. (Tenn.) 600; A. & E. Enc. of Law (2nd Ed.) Vol. 19, p. 151; Enc. of Pleading & Practice, Vol. 13, p. 187, note 1); and further, that under the provision of the Civil Code itself, on which the right of action, if any, is based, it is expressly provided that such right of action to the survivor shall exist "for the space of one year from the death" (St. of Facts. p. 101 & See Art. 2315, Revised Civil Code of Louisiana, Merrick's Annotated Edition of the Civil Code of Louisiana, p. 559); and in view of this provision the right of action, by the terms of the statute itself, was thus extinguished with the period of one year from the date of Miller's death, and was not susceptible of being asserted or enforced in any jurisdiction or forum after the lapse of that period. (Boyd v. Clark, 8 Fed. Rep. 852; Whalen v. Gordon, 95 Fed. Rep. 319; Thereaux Administrator v. Ry. Co., 27 U. S. 508, 64 Fed. Rep. 484; The Harrisburg, 119 U. S. 199, 30 L. Ed. 358; Davis v. Mills, 194 U. S. 450-458, 48 L. Ed. 1067-1072; Cyc. of Law & Procedure, Vol. 25, p. 1021; A. & E. Enc. of Law, Vol. 8, p. 875; Vol. 19, p. 146-151).

And where a suit or action, based on a statutory right of action, is commenced after the lapse of the period fixed by the provisions of the statute in which the right of action can be
 246 prosecuted, as in this case, such limit being a part of the right itself thus created by the statute, and not merely a matter of remedy upon it, the statute itself no longer furnishes even a *prima facie* right of action as basis for recovery, and the rule requiring the ordinary statute of limitation to be specially plead in order to avail as a defense and defeat the action, does not apply. (A. & E. Enc. of Law, Second Ed., Vol. 19, pp. 150 & 151, and cases there cited; Enc. of Pleading and Practice, Vol. 13, p. 186 and 187 and note 1; Cyc. of Law & Procedure, Vol. 25, pp. 1020 and 1403, and cases there cited).

For our views fully presented in this connection on submission of

this cause, we respectfully refer again to appellants' supplemental brief, pp, 3-10, filed with consent of counsel and the court, in this cause, on the date of submission.

Third.

That the Honorable Court of Civil Appeals erred in its decision and opinion by adopting as its own the conclusions of fact of the Trial Court, as set forth at length and in detail in its opinion.

Fourth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Fourth Assignment of Error urged by appellants and presented on pages 74 and 75 of appellants' brief, complaining that the Trial Court erred in admitting the depositions of H. P. Dart, over the objections of defendants, as set forth and for the reasons stated in defendants' bill of exception No. 6, for the reasons: (1) that the evidence offered was not admissible under the allegations of plaintiffs; and (2) that the amended Act of 1884, of the State of Louisiana could not apply to the Louisiana Western Railroad Company in this case, because of the provision in the Act of 1878, creating such corporation and exempting it from such liability, and the failure of the Texas court to give full faith and credit to the provisions of such incorporating Act of the Louisiana Legislature would be contrary to the Constitution and Statutes of the United States of America; and the Louisiana Amended Act of 1884, undertaking to create the statutory right of action relied on, if applied to the Louisiana Western Railroad Company would impair the obligation of a contract.

Fifth.

That the Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the Fifth Assignment of Error urged by appellants and presented on pages 78 et seq. of the brief on file, complaining that the Trial Court erred to the prejudice of the defendants in admitting the testimony of the witness H. P. Dart, over the objections of defendants, as set forth and for the reasons fully stated in defendants' bill of exception No. 5, for the reasons: (1) that the evidence offered was not admissible under the allegations of plaintiffs' petition; and (2) that the amended Act of 1884, of the State of Louisiana could not apply to the Louisiana Western Railroad Company in this case, because of the provision in the Act of 1878, creating such corporation and exempting it from such liability, and the failure of the Texas Court to give full faith and credit to the provisions of such incorporating Act of the Louisiana Legislature would be contrary to the Constitution and Statutes of the United States of America; and the Louisiana Amended Act of 1884, undertaking to create the statutory right of action relied on, if applied to the Louisiana Western Railroad Company, would impair the obligation of a contract.

Sixth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Sixth Assignment of Error urged by appellants and presented on pages 81 et seq. of their brief on file, complaining that the trial court erred in admitting over the objections of defendants, the depositions of the witness H. P. Dart, set forth in defendants' Bill of Exception No. 7, for the reasons:

(1) that the evidence offered was not admissible under the 248 allegations of plaintiffs' petition; and (2) that the amended Act of 1884, of the State of Louisiana could not apply to the Louisiana Western Railroad Company in this case, because of the provision in the Act of 1878, creating such corporation and exempting it from such liability, and the failure of the Texas Court to give full faith and credit to the provisions of such incorporating Act of the Louisiana Legislature would be contrary to the Constitution and Statutes of the United States of America; and the Louisiana Amended Act of 1884, undertaking to create the statutory right of action relied on, if applied to the Louisiana Western Railroad Company, would impair the obligation of a contract.

Seventh.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Seventh Assignment of Error urged by appellants and presented on pages 84 and 85 of their brief on file, complaining that the court erred to the prejudice of each of the defendants in and by its judgment and decree and in its conclusions of fact and law, for the reasons that there was a fatal variance between the plaintiffs' allegations and the facts proven, in this: that while the evidence introduced by and on behalf of the plaintiffs, over the objections of defendants, showing the existence of the statutory laws and codes of the State of Louisiana, and the construction thereof by the courts of said State, upon the existence and effect of which the judgment, if any, in favor of plaintiffs must stand, yet there was no pleading on the part of the plaintiffs, as to the existence or the effect of such statutes and other laws of the State of Louisiana, to justify the admission of evidence thereof, or to support a judgment on such theory, and therefore the pleadings of plaintiffs do not justify or support the judgment as rendered on the evidence.

In this connection the Honorable Court of Civil Appeals erred in holding that the objections pointed out in the pleadings of plaintiffs were supplied by averments in the answers of defendants.

249

Eighth.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Eighth Assignment of Error urged by appellants and presented on pages 87 et seq. of their printed brief on file, complaining that the court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and

Texas & New Orleans Railroad Company, in its judgment and decree against them, and in the conclusions of fact and law upon which said judgment is based, in this, that under and by virtue of Section 17 of the act of the legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of William Miller, and such immunity and exemption from liability was a matter of contract between the State of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; and the act of the legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State so as to give, or attempt to give and create the right of action asserted by plaintiffs in this cause, would have, and did have, the effect, if enforceable, of impairing the obligation of such contract, and thus would be and was violative of the provisions of the Constitution of the State of Louisiana, and of the State of Texas, and of the United States of America, and especially of Section 10 of Art. I of the Constitution of the United States of America.

And in this connection we insist: (1) That Section 17 of the act of the Louisiana legislature of 1878, incorporating the Louisiana Western Railroad Company, according to the testimony in this case, was a valid act of the State of Louisiana and was entitled to full faith and credit by the Courts of Texas, and that the failure and refusal to give such faith and credit to said act, on the part of the Texas Courts, in behalf of the appellants, were violative of their rights, privileges and immunities under the Constitution and
250 Statutes of the United States; and (2) that the legislative act of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of that State, if sought to be applied to the appellants in this case, would impair the obligation of a contract and would thus violate the State and Federal Constitutions.

And in this connection the Honorable Court of Civil Appeals erred in the following language in its opinion:

"As to the provision in the legislative charter of the Louisiana Western Railway Company relieving the company from liability for injuries resulting in the death of its train operatives, we will remark that such provision was not, within the purview of Art. 10 Sec. 1 of the Constitution of the United States, such a contract between the railroad company and the State of Louisiana as the State was inhibited from impairing an obligation. As before intimated, the power of the State to exercise its general legislative functions could not be traded or bartered away in any such manner. It is not left to conjecture what the ruling of the Supreme Court of the United States would be, if a case arising under the Employers' Liability Act should come before it involving the question of immunity from liability claimed here by the defendant under its charter. That great and pure tribunal with one breath would blow it away as though it were but thistle down, and yet, an act of Congress can no more impair the obligation of a contract than can the act of a state legislature."

We suggest that the Learned Court, in predicting the view that the United States Supreme Court would take of this provision, if coming in conflict with the Employers' Liability Act, overlooks the essential fact that the Employers' Liability Act passed by Congress is based upon the reserve power in the Federal Constitution to regulate interstate commerce independently of and beyond the power of the State. Hence it doubtless would be properly held that this provision in the Act of incorporation at the time of its enactment could not extend to the protection of the local corporation in reference to

those matters in which it might in the future become involved in the conduct or course of interstate commerce. But

251 the present controversy involves no such question. It relates merely to local occurrences in the State of Louisiana of that class over which the legislature of Louisiana had control, under the powers of the state constitution, and which state constitution, by the way, under the undisputed evidence of this case in no wise prohibited the granting of such privileges and immunities as that provided for in Section 17.

Again, the Honorable Court in this connection erred in holding that the amended act of 1884 of the State of Louisiana was a species of police regulation enacted under the police power which the former legislature of Louisiana could not contract away. The evidence in this record, giving the history and the object of this act of Louisiana clearly demonstrates that the purpose was mere compensation to certain designated relatives in proportion to the damage sustained by them; and indeed, if the object of the amended act of 1884 of the State of Louisiana was in any sense or degree penal in its nature, it would not be transitory and could not be enforced beyond the jurisdiction of Louisiana. As authority for this proposition it is sufficient to refer to that passage of Wharton on Conflict of Laws (Third Edition), section 480a, which is quoted by this Honorable Court on page 4 of its opinion in this cause.

Ninth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Ninth Assignment of Error urged by appellants and presented on pages 104 and 105 of their brief on file, complaining that the Trial Court erred to the prejudice of each of the defendants, the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in its judgment and decree against them, and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston,

in said Harris County, Texas, to Lafayette, in Louisiana, and
252 in so doing used indiscriminately on either the engines, rolling stock and employes of the other, as the business or convenience required, and each hired for and discharged employes in the said joint business, and the employes hired by one were required to perform, and did perform, services on the railway of the other;

that such employes made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways, as continuous route, and were partners in such business, sharing in the profits and losses thereof."

And the court erred in concluding, as matter of law, that the Texas and New Orleans Railroad Company was jointly liable with the Louisiana Western Railroad Company for the injury and death of the said William Miller, and in rendering joint and several judgment against the two defendants accordingly.

Tenth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Tenth Assignment of Error urged by appellants and presented on page 127 of their brief on file, complaining that the Trial Court erred in its judgment and decree, and in that portion of its conclusions of fact and law, being paragraph numbered 2, to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employes operating the trains relied upon the defendant companies to keep the said gates closed so as not to expose them to peril of injury or death by derailment, and that the failure of the defendants to keep such gates closed was negligence on their part proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that, according to the facts of the case, and under the law applicable thereto, the said gates had been placed in the right-of-way for the use and benefit of third parties, and the Louisiana

Western Railroad Company recognized the duty of said third parties to keep such gates closed, and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of the defendants, or either of them, rendering them liable for the alleged negligence and death.

Eleventh.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Eleventh Assignment of Error urged by appellant and presented on pages 130 and 131 of their brief on file, complaining that the Trial Court erred to the prejudice of each of the defendants and in its judgment against them, and in its conclusions of fact and law upon which said judgment was based, and especially in that portion of its said conclusions of fact and law, being paragraph numbered 4, reading as follows, to-wit:

"I find that some hours previous to the derailment of Miller's locomotive, another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right-of-way, within a short

distance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employes of defendants, in charge of one of the defendant's east-bound trains, gathered about the dead one, holding a 'ceremony,' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right of way by the dead one; and I find that defendant knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open, cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified Miller of that fact, and in time to have had the said cattle removed from the right-of-way, and I find that it was the duty of defendants

254 and the section upon which the said cattle were, to have removed said cattle, or, failing so to do, that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right-of-way, and that they could have notified him, and in that case he could have been on the lookout for said cattle, and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the said Miller notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Miller, and that plaintiffs were actually damaged by his death in the sum hereafter stated."

And the court erred in this connection, in concluding, as matter of law, that the facts so found, as above quoted, constituted actionable negligence on the part of the defendants, or either of them, and in accordingly rendering judgment against them on such grounds, for the following reasons, to-wit: (1) that there was no pleading in the plaintiffs' petition charging actionable negligence on the part of the defendants, or either of them, in leaving the dead animal near the track, whereby other live animals were attracted onto the right of way, and thereby the latter became an obstruction causing the wreck, the allegation of the petition, on the contrary, being that the dead or wounded animal itself got upon or was left upon or near the track, and itself became an obstruction causing the wreck, and there being no evidence to support this latter allegation, as actually made in the pleading; (2) that, under the undisputed facts in the case, there was no testimony or circumstance of probative force amounting to any evidence that the animal which was encountered and caused the wreck and the death of William Miller was one of those animals actually observed inside the right-of-way fence, and near the track,

255 by the fireman, when he was passing the point of the wreck seven or eight hours prior to its occurrence; and hence the necessary causal relation between the failure to remove the cattle seen by Reese, or notify Miller of their presence at this point,

and the wreck itself, is not established by any evidence in the record so as to support and sustain the judgment rendered.

And in this connection we specifically urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the 4th paragraph thereof, to the effect that the defendants were guilty of negligence in failing to remove from the right-of-way enclosure the cattle which were observed by their employer Reese, inside of the fence, or to notify the deceased of the presence, it was necessary to show by some legal evidence the identity of the animal thereafter encountered by Miller's locomotive, as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there was no causal relation shown in the record between the negligence found by the court, in his conclusions, and the injury complained of, to support the judgment.

The record shows that the witness Reese (he being the only person who saw any animals on the track at this point on the date of the accident) passed the point between the hours of 4:39 P. M. and 4:45 P. M., and saw one dead animal south of the track and four or five other live animals inside of the right-of-way fence, around this one, without any special description of these live cattle; that the train with which Miller and Gross were engineer and fireman reached the point of the accident, going in the opposite direction at 11:45 P. M. on the same date, encountering one large animal said to have been a big bull, causing the derailment, and at that time no other cattle were encountered or observed at this point. From the time when Reese had observed the several animals at this point, to the time when Miller's locomotive encountered the one animal, was about seven hours. In the meantime, the section foreman Bustin, at 6 P. M., roadmaster Lawlor, at 6:50 P. M., engineer Hildebrand, at 8:15 P. M., and Engineer Kimmer, at 11:07 P. M., had passed the point of the accident and observed no cattle on or near the track or within the right-of-way at this point; and the evidence showed without dispute that people residing on either side of the railroad in the vicinity of this point made a practice night and day of passing through the right-of-way gates, frequently leaving them open on such occasions, so that cattle indiscriminately would have access to the right-of-way and road-bed and would enter upon it. Thus we insist, in the light of the record and undisputed facts that there is no legal evidence whatsoever to support the conclusion that the large animal encountered by the locomotive drawn by Miller and Gross at 11:45 P. M., causing derailment, was one of the several cattle observed by the witness Reese as he passed this point between 4:39 and 4:45 P. M., and hence the holding and conclusion of the court that the failure of the defendant companies to drive out the cattle observed by Reese, or notify Miller and Gross of their presence upon the right of way, was the proximate cause of the derailment, is not supported by any legal evidence in this case.

Twelfth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Twelfth Assignment of Error

urged by appellants and presented on page 148 of their brief on file, complaining that the Trial Court erred to the prejudice of each of the defendants in its judgment and decree against them, and in its conclusions of fact and law upon which the judgment is based, as set forth in paragraph numbered 5 of such findings and conclusions, reading as follows:

"I find that there is a substantial similarity between the laws of Louisiana and the laws of Texas giving right of action for injuries resulting in death, and under the law of Louisiana that Miller was not a fellow-servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death."

For the reasons (1) that there is no pleading on the part of the plaintiffs to justify such finding as a basis for judgment in
257 this cause; and (2) that, under the undisputed facts in this case, in so far as same were admissible in evidence to support the plaintiffs' pleadings, the injury and death of Miller resulted from the risks and dangers of the service open and known to him, and of which he assumed the risk.

Thirteenth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Thirteenth Assignment of Error urged by appellants and presented on page 161 of their brief on file, complaining that the trial court erred to the prejudice of defendants in rendering judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this: that, according to the undisputed evidence, the deceased was a man of considerable knowledge and experience as a locomotive engineer, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, being familiar with the method of fencing and maintaining gates along the right-of-way and enclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track and within the enclosed right-of-way at such points as that at which this wreck occurred, and that, under the undisputed facts, and according to the law applicable thereto, the deceased William Miller had assumed the risk of the accident and injury, and neither of the defendants is liable therefor to the plaintiffs.

Fourteenth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Fourteenth Assignment of Error and the Fifteenth Assignment of Error urged by appellants and presented on pages 162 and 164 of their brief on file, complaining that the trial court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting over the objection of said defendant printed rule No. 334 and Rule No. 420, set forth in defendant's Bills of Exception Nos. 2 and 3, which are

258 hereby referred to, for the reasons that the same were irrelevant and immaterial to any issue of the case, so far as the Texas & New Orleans Railroad Company was concerned, and were rules for which, so far as the evidence indicated, this defendant was in no wise responsible.

And in this connection we insist that the point was appropriately preserved on behalf of the Texas & New Orleans Railroad Company, as shown in the Bills of Exception.

Fifteenth.

That the Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the Sixteenth Assignment of Error urged by appellants and presented on pages 166 and 167 of their brief on file, complaining that the Trial Court erred to the prejudice of defendant, Texas & New Orleans Railroad Company, in rendering judgment against it jointly with its co-defendant, for the reasons: (1) that at the time of the wreck and injury of the said William T. Miller he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employé of the said defendant; (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein, were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of respondent superior; (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Miller, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

Sixteenth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Seventeenth Assignment of Error urged by appellants and presented on pages 173-175 of the brief on file, complaining that the Trial Court erred to the prejudice of each of the defendants, in its judgment and 259 decree against them, and in its conclusions of fact and law, as found, upon which said judgment is based, for the reason that, according to the undisputed facts in this case there were such dissimilarities between the laws of the State of Louisiana, in which the accident and injury occurred, and the laws of the State of Texas, in which this suit was prosecuted, as to render it impracticable and contrary to the policy of the law and the comity between the two States for the courts of Texas to take cognizance of and undertake to determine the controversies involved, and to administer and apply the laws of Louisiana, and that such dissimilarities and in-

consistencies and conflicts between the laws consisted, according to the evidence, especially of the following features and particulars, to-wit:

(1) That the laws of the State of Louisiana, in cases in which damages were allowed to parents for injuries resulting in the death of a child, and in which damages were allowed to the children and surviving wife for injuries resulting in the death of a husband, included and embraced in and as part thereof (2) the damages decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time that intervened between the accident and his death, for his disfigurement, and for the expenses of his illness; (b) the loss or deprivation of the decedent's society and his aid and support, also the expenses of his death and burial; (c) damages for mental suffering of the survivors.

(2) That at the time of the occurrences of said injury and death, according to the laws of Louisiana applicable to the controversies involved in this cause, the engineer and fireman (Miller and Gross) were fellow-servants, so that the defendant companies were not liable under said law for the death of either of them, in so far as it was the result of negligence on the part of the other.

(3) That, according to the provisions of Act No. 21 of the General Assembly of the State of Louisiana for the year 1878, which created the corporation of the Louisiana Western Railroad Company, the defendants were exempt from liability for the alleged injuries resulting in the death of Miller and Gross.

(4) That at the time of the alleged occurrence in the State of Louisiana, and according to the laws of Louisiana applicable to the issues and controversies in this case, the trial and appellate judges had greater power and control over the verdicts of juries than the judges of the courts of the State of Texas had or have, and according to the laws of the State of Louisiana, nine members of the jury out of twelve had the power to render a verdict.

Wherefore defendants aver and submit that the pleas setting up such facts and conditions and dissimilarities of law in bar of the action were supported by the evidence, and should have been sustained, and the court should have dismissed said cause or rendered judgment in favor of defendants.

Seventeenth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Eighteenth Assignment of Error urged by appellants and presented on page 176 of their brief on file, complaining that the trial court erred in rendering its judgment and decree herein for the aggregate sum of sixteen thousand dollars, and that said amount is exorbitant and excessive, and beyond the amount which the plaintiffs are legally entitled to, under the evidence, and that such judgment is the result of the court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence, over the objection

of defendants, and that it was incompetent and against the policies of the courts of the State of Texas and against the spirit of comity between two several states for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas in such cases.

And in this connection we insist that the holding of this court to the effect that there was no error on the part of the trial
261 judge in taking into account and considering the damage that decedent, Miller, might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness, is virtually and directly in conflict with the decision of the Supreme Court of Texas in *Ry. Co. v. Richards*, 68 Texas, 378.

In the Richards case these very elements and items of damage were sought to be recovered by the survivors for the injury resulting in death in the State of Louisiana, and Justice Stayton, in refusing to take cognizance of the case and to award the relief prayed, used the following language:

"The most liberal State comity cannot, in reference to such a matter as that before us, require one State to enforce the laws of another when in conflict with its own law."

Appellants would further show to the court that the attorneys of record for the appellees herein are Messrs. John Lovejoy and John W. Parker and S. H. Brashear, who reside and have their post-offices addresses in the City of Houston, Harris County, Texas.

Wherefore appellants pray for the issuance and service of citation and notice upon this motion, as provided by law, and that this motion for rehearing be granted and the opinion heretofore rendered and filed herein be re-considered and set aside, and that upon full and final hearing the judgment of the lower court be reversed and the cause remanded.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD &
A. L. JACKSON,

*Attorneys for Appellants, Texas & New Orleans
Railroad Company & Louisiana Western Railroad Company.*

262 (Endorsed:) Texas & New Orleans Railroad Company, et al.,
Appellants, v. Fanny Miller, et al., Appellees. No. 4110. In
the Court of Civil Appeals for the Fourth Supreme Judicial District
of Texas at San Antonio. Appellants' Motion for rehearing. Filed
in the Court of Civil Appeals at San Antonio, Texas, May 13, 1910.
Jos. Murray, Clerk. Filed in Supreme Court, June 23, 1910. F. T.
Connerly, Clerk.

Order Overruling Motion for Rehearing.

WEDNESDAY, May 25th, A. D. 1910.

No. 4410.

T. & N. O. R. R. Co. et al., Appellants,
 vs.
 FANNIE MILLER et al., Appellees.

Appeal from Harris.

The motion of appellants for a rehearing filed May 13th, 1910, coming on to be heard, and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled; it is further ordered that appellants Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and their surety The United States Fidelity & Guaranty Company pay all costs of this motion.

Petition for Writ of Error.

In the Supreme Court of Texas.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in
 Error,
 versus
 FANNIE MILLER et al., Defendants in Error.

263 Petition for Writ of Error to the Court of Civil Appeals for
 the Fourth Supreme Judicial District of Texas, at San Antonio.

To the Honorable Supreme Court of the State of Texas:

Your petitioners, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, hereinafter styled plaintiffs in Error, applying to this Honorable Court for Writ of error in cause No. 4410, styled Texas & New Orleans Railroad Company, et al., Appellants, v. Fannie Miller, et al., Appellees, pending in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, would respectfully show that the Texas & New Orleans Railroad Company is a private corporation, created and existing under and by virtue of the laws of the State of Texas, with its principal office, place of business and domicile located in the City of Houston, Harris County, Texas, and that the Louisiana Western Railroad Company is a private corporation, existing under and by virtue of the laws of the State of Louisiana, and having and maintaining its principal office, place of business and domicile in the State of Louisiana, and beyond the limits of the State of Texas; that the defendants in error, Fannie Miller and the minors, G. W. Miller,

William D. Miller, and Dorace H. Miller, and their attorneys of record, John Lovejoy and John W. Parker and S. H. Brashear, each and all reside and are to be found in the City of Houston, Harris County, Texas.

Petitioners further show that the Honorable Court of Civil Appeals has stated with substantial accuracy in its opinion the history and nature of this suit, but petitioners object to some of the inferences of fact and conclusions of law announced in the opinion of said Court of Civil Appeals, and said objections will be hereinafter specifically set forth.

Petitioners further show that the defendant in error, Fannie Miller, suing herein for herself and as next friend for the minor defendants in error, as plaintiff below, recovered judgment in the District Court of Harris County, Texas, January 30, 1909, against the plaintiffs in Error, jointly and severally, for the aggregate sum of sixteen thousand dollars, apportioned as follows:

Eight thousand dollars to defendant in error Fannie Miller, two thousand dollars for the use and benefit of the minor George W. Miller, Two thousand five hundred dollars for the use and benefit of the minor W. D. Miller, and three thousand five hundred dollars for the use and benefit of the minor Dorace H. Miller; and from said judgment the plaintiffs in error, as defendants below, appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and thereafter, under order of the Supreme Court of Texas, said cause was transferred for hearing and submission to the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, and the latter court rendered and delivered its decision and opinion thereafter on the 4th day of May, 1910, in all things affirming the said judgment of the lower court; that afterwards, on the 13th day of May, 1910, plaintiffs in error filed in said Court of Civil Appeals their motion for rehearing, and thereafter, on the 25th day of May, 1910, said motion for rehearing was overruled and refused by the Court of Civil Appeals.

Petitioners further show, as grounds for this application, that the Honorable Court of Civil Appeals, in and by virtue of its opinion, conclusions and decision, has erred on points of law involved in this cause, and duly presented in said motion for rehearing, and set forth in the following specific grounds, to-wit:

First Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the first assignment of error urged by appellants, and presented on page 6 of their brief on file, and embraced in the first and sixteenth grounds of their motion for rehearing, contending that the trial court erred in overruling the pleas to the jurisdiction and in abatement of each of said defendants, as set forth in Section II of the original answer of the Louisiana Western Railroad Company, and Section I of the first amended

original answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in defendants' bill of exception No. 1, referred to and made part thereof.

And in this connection the Honorable Court of Civil Appeals erred in its conclusions of law as follows: (1) That the right of action based and founded entirely on the statute law of Louisiana for injuries resulting in death was operative beyond the jurisdiction of that State, so as to be enforceable in the courts of Texas; (2) that the conflict and inconsistencies between the laws of the two States, as to the measure and elements of damages awarded for the injuries resulting in death, are not such as to preclude the courts of Texas from taking cognizance of the cause and administering the laws of Louisiana on principles of comity; (3) that the conflict between the laws of the State of Texas by virtue of its statutes and the laws of Louisiana, on the subject of the fellow-servant doctrine, as a defense, is not such as to preclude the courts of Texas from taking cognizance of such cause on the grounds of comity; and (4) that the special immunity vested in the Louisiana Western Railroad Company by its charter provision, whereby it is exempt from liability for such injury and damages as are involved in this cause, did not constitute such conflict with the policies of the State of Texas as to preclude the courts of Texas from taking cognizance of said cause and administering the laws of Louisiana thereto, notwithstanding the pleading of such charter provision as a defense. And by this holding the court places itself in a position to question the validity of the said charter provision, as a legislative act of the State of Louisiana, and thus to refuse full faith and credit to the acts and proceedings of the State of Louisiana, thereby depriving appellants of a right, title, privilege and immunity under the constitution and statutes of the United States of America.

Statement.

The defendant Louisiana Western Railroad Company urged and submitted in due order a plea in abatement, and to the jurisdiction of the court, in the following language, to wit:

266 "Said defendant shows to the court that, as appears on the face of plaintiffs' petition herein, the cause of action, if any the plaintiffs have, arose from acts and injuries occurring, not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, if any, measured except and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the court that the laws of Louisiana applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they will have to recover, if at all, and according to which the defenses to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applica-

ble to any action accruing from a similar occurrence within the limits of the State of Texas; and that such inconsistency and dissimilarities between said laws of the two States of Louisiana and Texas are so pronounced and radical, that the courts of this State, in the exercise of substantial justice and in comity and in accordance with the statutes and the laws and public policies of this State, cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto, and defendant avers that it is informed and believes, and upon such information and belief so charges, that said dissimilarities and inconsistencies, aside from many others, consist, and did at the time of the injuries and since, consist of the following features and differences in particular, to wit:

“(a) That at the time the action alleged in plaintiffs’ petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of action, the parties and the remedy and the measure of damages, the law-
267 prevailing in the State of Texas on each of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana, in that said laws of Louisiana provided, authorized and entertained no joint action in favor of the wife and children, and no distribution among them of the sum awarded by the verdict, according to the discretion of the jury, in a suit for the death of the husband and father, as authorized by the laws of the State of Texas; that said laws of Louisiana provided and entertained no action in favor of the adult children of a deceased person, arising out of his death, and limited the damages in such a case to that accruing to a minor child during its minority; that the laws of the State of Louisiana, in cases in which damages were allowed to the surviving wife or minor children for injuries resulting in the death of the husband and father, included in and as part of such damages compensation for their wounded feelings and affections, caused by the death of the husband and father, and for the deprivation of the pleasure and comfort of his society, while the laws of the State of Texas allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the pleasure and comfort of the society of the deceased.

“(b) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of Louisiana, with reference to the doctrine of the negligence of fellow-servants as a matter of defense to the Louisiana Western Railway Company, were and have remained, and still are, totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased’s fellow-servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana, when plead and proven, as this defendant proposes to do, if required to plead, an available defense, and would exempt defendant from liability in this action; yet, according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such

defense as the negligence of a fellow-servant would not avail as a bar to recovery.

268 "(c) That the Louisiana Western Railway Company was, and is, a corporation created by special act of the legislature, known as Act No. 21 of the Acts of the General Assembly of the State of Louisiana for the year 1878, approved March 30, 1878, and said charter and special act declares and provides that the company shall not be responsible for the death or personal injury of any employé by any act of negligence on the part of the company, its officers or employés. The portion of said act referred to reads substantially as follows, to wit:

"That said company, its officers or employés, shall not be liable in any sum whatsoever, of damages or cost in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employés, and sustained by any person while riding or being transported free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any services as an employé of said company, or as an employé of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel and all such employés shall labor and render service, upon said railroad, and upon all other railroads and transportation lines occupied and operated by said Company, at their own risk as to personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers or employés, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

269 "That by said act of legislature, the assumption of risk by the deceased Miller, as an employé, and exemption from responsibility on the part of the defendant Louisiana Western Railway Company for acts of alleged negligence of a fellow-servant, or any other servant or employé, was largely extended beyond what it was at common law, and that this became a matter of contract between the said defendant and the State of Louisiana, and a contract to which the deceased Miller, by virtue of his employment and service, became a party, and that the laws of the State of Louisiana under said charter and said contract would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said special act of the legislature above set forth were not, when enacted, nor since, nor at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Courts of the State of Texas, in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administe

and apply said special act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

"(d) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time, the laws of the State of Louisiana and the laws and practices of the courts of the State of Texas were essentially different and conflicting in reference to the power and control of the trial and appellate judges over the findings and verdicts of juries, and with reference to the number of verdicts that might be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict; that while in the State of Louisiana, and according to the laws and rules of practice as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion of the judge

to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the State of Texas the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the occurrence of the entire jury is essential to the finding and return of a verdict.

"Wherefore, the defendant Louisiana Western Railway Company prays that this court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs." (Tr. pp. 44 to 49).

The defendant Texas & New Orleans Railroad Company, in its answer, adopted and urged also the plea in abatement and to the jurisdiction of its co-defendant, as above set up (Tr. pp. 23 and 24) and these pleas were submitted together to the trial judge. (See bill of exception No. 1, Tr. pp. 44 et seq.)

The defendants, in support of these pleas, prior to the hearing on the merits, introduced the depositions of H. P. Dart, Esq., of the New Orleans Bar, who qualified and gave his testimony as an expert, and with such depositions, supplemented by statutory codes and various court decisions of the State of Louisiana, conclusive proof was made upon the following points in support of these pleas, to wit:

(1) The basis and history of the right of action in Louisiana for injuries resulting in death (Tr., pp. 52-56); (2) differences in the measure of damages for injuries resulting in death between the laws of Louisiana and of Texas (see bill of exception, Tr. pp. 56-58); (3) The defense of fellow servant was available to defendants in this case under the laws of Louisiana, and under those laws Miller and Gross, the engineer and fireman, were fellow-servants, and there was no statute, as in Texas, qualifying the doctrine (bill of exception, Tr. pp. 59-61); (4) that the defendant Louisiana Western Railroad Company was incorporated by virtue of an act of the Louisiana legislature which became effective March 30, 1878, and this act contains a provision exempting the defendant from liability for injuries such as those inflicted upon Miller and Gross, and which are the basis of this suit; and at the time of said incorporating

act it was not violative of any provision of the Louisiana Constitution, nor was there any right of action at that time for injuries resulting in death for which the recovery herein sued for could be had, such right of action (if any) having been created subsequently by amendment of the statute in 1884 (see bill of exception, No. 1, Tr., pp. 63-66); (5) that the power and discretion exercised by the trial and appellate judges over verdicts of juries is more extensive and absolute according to the practice of the State of Louisiana than in Texas (see bill of exception No. 1, Tr., pp. 67 and 68); (6) that the source of the law of master and servant in the State of Louisiana is the statutes of that State, and these have their basis and origin in the civil law. (See bill of exception No. 1, Tr., pp. 69-70).

The testimony of the witness Dart, together with the legislative acts of Louisiana and decisions on the points above mentioned, is set forth literally on pages 10-24 of appellant's brief, and is re-stated substantially, but not fully, on pages 7 to 12 of the opinion of the Court of Civil Appeals.

Authorities.

Willis v. R'y Co., 61 Texas, 432.
 R'y Co. v. Richards, 68 Texas, 375.
 R'y Co. v. McCormick, 71 Texas, 660.
 De Harn v. R'y Co. (Tex. Civ. App.) 22 S. W., 249.
 De Harn v. R'y Co. (Sup. Ct.), 86 Texas, 71.
 R'y Co. v. Jackson, 89 Texas, 107.
 Slater v. Mexican National R'y Co., 194 U. S., 48 L. Ed., 900.

Argument.

Where the laws of two States relating to the cause of action and the defenses applicable to the facts are in radical conflict, and action was instituted in the court of the State in which the facts giving rise to the cause of action did not occur, jurisdiction of such cause
 272 should not be entertained. This doctrine is thoroughly settled in the jurisprudence of our State, and is announced and applied to various sets and conditions of fact in the Texas decisions above cited. In cases of tort, the laws of the State or county in which the tort was committed are applicable, and if in such case action be brought in another State, the courts of the latter will take cognizance of the right of action, and administer the laws of the locality in which the right of action arose—provided the laws of the forum, on a similar state of facts occurring within its limits, are substantially the same as those prevailing in the foreign State or country. The basis of this principle and practice is the spirit of comity obtaining between the two States or countries, and its recognition and application in any given case necessarily presupposes the co-existence of substantially identical laws applicable to the subject of controversy in the two States, for otherwise the trial and adjudication of the controversy would tend to infringe and ignore, instead of promoting, the principle of comity. The doctrine, as we conceive

it, applies not only to those conflicts which are inherent in the right of action itself, but as well to the remedies, measures of damage, the defenses, and other vital features of the action; and this view, we think, is amply illustrated and sustained by the decisions of our own courts above cited, which we will here briefly review.

In the case of *Willis v. R'y Co.* 61 Texas, 432, the Supreme Court of Texas declined to entertain jurisdiction of an action by the surviving wife for damages on account of the negligent killing of her husband in the Indian Territory, it being alleged in the petition that there was no right of action in the Indian Territory accruing to the wife for injuries there resulting in the death of her husband.

In its opinion, our Supreme Court, speaking through Chief Justice Willie, used the following language:

273 "The rules governing suits arising out of torts committed in a locality other than the government where the redress is sought are about these, as deduced from the authorities upon the subject: Where the action is transitory and is based on personal injuries recognized as such by universal law, the suit may be brought wherever the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was committed. *Rorer on Interstate Law* pp. 154, 155.

"But where the right of action does not exist except by reason of statute, it can be enforced only in the State where the statute is in existence, and where the injury has occurred. That is to say, the cause of action must have arisen, and the remedy must be pursued in the same State, and that must be the State where the law was enacted and has effect.

"The principle upon which the doctrine rests is the want of power in a State to give her laws an extra-territorial effect. Our State, in providing that the negligent killing of an individual shall constitute a cause of action in certain of his survivors for damages against the party committing the homicide, is providing only for cases occurring within her own borders. She makes that an actionable tort, which was not so before by common law. Within her own jurisdiction the law is changed by reason of this statute, but it remains the same everywhere else; and the death of the husband through negligence of a railroad company, if the injury occurred in the Indian Territory, was no more a cause of action after the passage of our statute than it was before.

The government exercising authority in the locality where this act was committed is the only one to determine and provide whether or not such an act shall be a good ground for suit in behalf of anyone, and to name the parties in whom the cause of action shall exist. It is not the mere giving of a remedy for a right previously possessed, but it is the creation of a right itself in certain parties which before belonged to no one whatever. Hence, it is held in all States

274 having statutes like our own, that the parties named in the domestic statute cannot sue in the State where it was enacted for damages caused by a negligent killing which has occurred in another." (61 Texas, 434.)

In the case of *T. & P. R'y Co. v. Richards*, 68 Texas, 375, suit was brought in a Texas court by a minor child to recover such damages as the father might have recovered, had he survived his injuries. The injuries occurred in the State of Louisiana, where such an action was authorized by statute. At that time, the amendment of 1884 of the Louisiana Civil Code, creating a right of action immediately to certain relatives for the damages done to them by the injury and death, had not been enacted. The Supreme Court of Texas declined to entertain jurisdiction, because at common law no such right of action existed, and there being no similar statute in his State, the rule of comity did not apply. Justice Stayton, of our Supreme Court, in giving the opinion, says:

"We know of no rule of law which would authorize a court of this State to give effect to the laws of another State conferring such right as is claimed in this case, when the laws of this State declare that the same facts, transpiring here, as are made the basis of the appellee's claim, could confer no right whatever to the relief sought. The most liberal State comity cannot, in reference to such a matter as that before us, require one State to enforce the laws of another, when in conflict with its own." (68 Texas, 378.)

In the case of *Railway Company v. McCormick*, 71 Texas, 660, it is held that the courts of Texas must decline jurisdiction of an action by a widow founded upon the negligent killing of her husband in Arkansas, because the laws of that State are so dissimilar to those of Texas that the courts of this State will not attempt to enforce them. Our Supreme Court, in its opinion, recites and reviews at some length the statutes of Arkansas, creating the right of action for injuries resulting in death, and calls attention to the difference between that statute and the statute of Texas on this subject, 275 and especially with reference to the procedure and relief provided for in the Arkansas statute; and in that connection the court used the following language:

"A difference in the statutes, in the beneficiaries, and in the procedure, would become more evident, should the widow, the child or children, the parents or parent surviving, the husband, etc., whose death had been caused in Texas under circumstances giving damages, seek to join in a suit to maintain their rights in an Arkansas court. Nor is it likely that the Texas law for the distribution of the recovery could have any effect. The distribution would not be left to the jury, when the statutes directed its descent as other personal assets.

"We see no other combination of facts giving the right to sue in both, except where the sole heir is one of those named in the statute of Texas who may sue in the absence of an administration.

But it does not appear that the remedies should be reciprocal. Statutes are enacted in the several States for the local public good, and as of themselves they have no extra-territorial effect, it is not likely that the effect to be given them by neighboring States has any influence inducing their enactment. They are not made to be enforced even in comity outside of the State. Comity extends only to enforce obligations, contracts and rights under provisions of law

of other countries, which are analogous or similar to those of the State where the litigation arises" (Rorer on Interstate Law, 5).

"When the courts are asked to enforce a right given under a local statute, and it is made to appear that the act complained of was committed out of the State, and it is shown that the laws of that State are similar to the local statutes giving the remedy, the duty of taking jurisdiction would be indicated, if the local courts will recognize the action as transitory.

"A majority of the members of the court, however, are averse to assuming duty of enforcing the more complicated statutes of
276 Arkansas upon the subject-matter of this litigation.

"While not receding from the utterances of C. J. Willie in the Willis case, 61 Texas, 432, nor formally adopting it—leaving the main question open as in the Richards case, 68 Texas, 375,—it is here held that the cause of action exhibited in the record, arising under and to be determined by the laws of Arkansas, which are so dissimilar in many respects from the Texas statutes, cannot be here enforced." (667 and 668.)

In the case of *De Harn v. Mexican National Railway Company* (Texas Civil Appeals) 22 S. W., 249, suit was brought in a Texas court against the Mexican National Railway Company by plaintiff for injury to her son, resulting in death, occurring in the Republic of Mexico. The petition alleged that the deceased was in the employment of the defendant railway company, and while so employed received his injuries in the Republic of Mexico, which were due to the negligence of the railroad company, and as a result of his injuries, he soon after died in the City of Laredo, Texas; that the plaintiff was dependent upon the deceased for support, and during his lifetime he had contributed to her from the proceeds and wages of his employment. There was no allegation in the petition with reference to the laws of Mexico on the subject of this litigation. In the District Court demurrers were interposed to the plaintiff's petition by defendant, in the following language:

"Now comes the defendant, by counsel, and says that the allegations in plaintiff's petition are wholly insufficient at law to require any answer of this defendant, and of this defendant prays the judgment of the court.

"And especially excepting to plaintiff's petition, defendant says that it affirmatively appears thereby that her claim for damages is for injuries done to her son, Lewis De Harn, while in the employ of defendant, viz., the Republic of Mexico, and that said injuries resulted in the death of said Lewis De Harn. Wherefore, de-

277 fendant says that the allegations of said petition do not show plaintiff entitled to the relief demanded, or to any relief whatever in this behalf, and of this defendant prays," etc.

The trial court sustained the demurrers, and appeal was taken to the Court of Civil Appeals. The Court of Civil Appeals at Galveston, through Justice Pleasants, affirmed the judgment of the lower court, citing and relying upon the former decisions of the Supreme Court in the case of *Willis v. R'y Co.*, *R'y Co. v. Richards*,

and R'y Co. v. McCormick, above referred to. (22 S. W. Rep., 249 and 250.)

Upon writ of error to the Supreme Court of Texas, the latter court affirmed the judgments of the District Court and the Court of Civil Appeals, and through Justice Gaines used the following language in its opinion:

"It is settled law that the statute of a State which for a tort gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extra-territorial force; and, in accordance with this rule, it has been expressly decided in this State that, for an injury inflicted in another State or Territory, which results in the death of the party injured, the surviving relatives have no right to recover in this State. *Willis v. Railway*, 61 Texas, 432; *Railway v. Richards*, 68 Texas, 375; *Railway v. McCormick*, 71 Texas, 660. But in each of the cases cited, the death occurred without the limits of the State. A seeming exception is, that if the law of the State where the injury is inflicted gives substantially the same right of action which is given by the law of the State where the suit is brought, and in favor of the same parties, by reason of the principle of comity, the right will be enforced in the latter State. The doctrine is recognized in the case last cited, though it was then held that the facts of that case did not bring it within the principle. That decision, however, leaves the question open.

"We use the phrase, 'a seeming exception,' because it cannot in fact be deemed an exception to the general rule. That rule is
278 founded upon the principle that the statutes of a State have no effect beyond its own limits, and that if the act or omission complained of be not actionable by the law of the State where it is committed, no action can properly be brought on it in another State, although, by the laws of the latter, the act would have been actionable if committed within its jurisdiction. * * *

"In order to illustrate this, let us take the case of a servant of a railway company who is injured by reason of the negligence of another employé of the same company. By statute in some of the States of our Union such corporations are held responsible for injuries which result from the negligence. Let us suppose that in a State where the common law as to such liability, is still in force, one employé of a railway company is injured by the negligence of his co-employé, and that the person injured is carried into a State where the statute has established a different rule, and there dies; would it be proper for the courts of the State where the death occurred to hold the company liable for the consequences of the negligence of its servants, when, according to the laws of the State where the negligence occurred, no action would lie for such negligence?

"The act committed or omitted, in any case of this character, is the primary ground of the action. Although the death of the injured person is a necessary condition to a recovery on part of the beneficiaries pointed out by the statute, at the same time, in order to enable them to maintain an action, it is quite as essential that such act or omission should be contrary to the law of the

place where the injury is inflicted. It should be not only misconduct, recognized by the law of the place where it occurs as unlawful to the person injured, but it should be such as is recognized by that law as legally injurious to those who seek to recover damages for the injury.

"As to torts, at least, the laws of a State have no operation beyond its own limits. When, for example, the courts of one State sustain a recovery for an injury to person or property inflicted
279 in another State, it is because the wrongful act is legally injurious in the State where committed, and not simply because it would have been actionable if committed within the territorial limits of the jurisdiction of the forum. The case of *Dennick v. Railway*, 103 U. S., 11, is not in conflict with this doctrine. There the injury was inflicted in New Jersey, and was actionable by the statutes of that State. The suit was brought in a court in New York, and was removed to the United States Court. The statutes of New York upon the subject were similar to those of New Jersey, and the court held that the action could be maintained in the courts of New York."

In the case of *Mexican National Railway Company v. Jackson*, 89 Texas, 107, a citizen of Texas sued the Mexican National Railway Company for personal injuries inflicted on him in Mexico while in the service of the defendant, and which did not result in death. The District Court assumed jurisdiction and rendered judgment upon verdict, which was affirmed by the Court of Civil Appeals. Upon writ of error, the Supreme Court of Texas reversed and dismissed the cause, holding that while an action of such a character is transitory, and may be maintained at any place where defendant may be found, yet the courts of this State cannot undertake to adjudicate rights originating in another State or country under laws materially different from those of Texas in relation to the same subject, thus approving the *McCormick*, *De Harn* and other cases cited *supra*.

After showing at length the difference between the Mexican and Texas laws, the court, in its opinion, says:

"The Mexican National Railway, is an important public highway in the Republic of Mexico, by which the commerce of that country is largely carried on with our people. Every judgment for damages rendered against it reduces its revenues, which must of necessity be restored through its charges for transportation of persons and property, and in the main must be paid by that people.
280 It is but just, and perhaps necessary to a proper maintenance of that means of transportation, that the country in which it is operated should determine the charges to be enforced against it. If Texas should open her courts to all persons that may be injured in Mexico, in the management of that railroad and others, it may seriously affect the means of commerce between this State and that Republic. Thus it becomes a matter of public concern and a proper subject for consideration in this connection, in view of the fact that the railway company is still subject to that jurisdiction. Justice does not demand the exercise of jurisdiction, and comity be-

tween the governments in this State and Mexico would seem to forbid that they should do so."

In the case of Mexican Continental Railway Company v. Mitten (13 Texas Civil Appeals, 36 S. W., 282), Judge Fly comments upon the former opinion of the Supreme Court reversing the judgment in the Jackson case, and affirms the judgment rendered in the Mitten case by the District Court of El Paso, and the Supreme Court subsequently refused writ of error in the Mitten case. However, there is not the slightest reason for supposing that the Supreme Court of Texas, by this refusal of writ of error in the Mitten case, meant to qualify, much less to overrule, its former decision in the Jackson case.

In the case of Railway Company v. Jackson, Justice Brown, stating the case distinctly recites "that the defendant below, by special plea, set up and pleaded the laws of Mexico in such cases, alleging that the contract of service was entered into in that Republic, and the injury occurred within the Republic of Mexico; that it was entitled to an adjudication under those laws which are so dissimilar to the laws of Texas that the courts of this State ought not to undertake to adjudicate them," etc.; and that this plea was supported by convincing proof of such dissimilarities. (89 Texas, 107.)

In the Mitten case, on the other hand, there was no allegation whatever in the petition, with reference to any laws of Mexico, bearing on the injury, and the Court of Civil Appeals specially emphasizes that "these questions were not raised in the lower court, but for the first time in this court, and the Court of Civil Appeals further says: "So far as the point (in the Jackson case) rests on the dissimilarities of the laws, it does not necessarily become a matter of discussion in this case where the laws of Mexico were not proved." (36 S. W., 284.)

Thus it is manifest that in the Mitten case, there being no pleading or proof as to the laws of Mexico, the court recognized and applied the common law right of action on the assumption that such right of action existed likewise in Mexico under the principles of the "universal law"; and this difference in the status of the records between the Jackson and the Mitten cases doubtless accounts for the refusal of writ of error by the Supreme Court in the latter case.

In Texas & Pacific Railway Company v. Cox, 145 U. S., 36 L. Ed., 832, there was an action brought in Texas against a Louisiana corporation for injuries inflicted in Louisiana resulting in death. Chief Justice Fuller, rendering the opinion of the Supreme Court of the United States, having compared the statutes of Louisiana and Texas, declared that they were substantially identical, and that the action being in its nature transitory, might be maintained in the jurisdiction of Texas. He says:

"The action, being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but as a statutory delict, it is contended that it might be justifiable not only where the act was done, but where redress is sought. If a tort at common law where suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired, but if the cause of action was created by statute, then the

law of the forum and of the wrong must substantially concur in order to render legal redress demandable.

"The statutes of these two States on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas."

The court then proceeds to discuss the decisions of the Texas court in the cases above cited.

Counsel for appellees will cite and rely on the decision in the Cox case as authority against our contention in the instant case, but we call attention to the fact that in the record of the Cox case there was no showing by pleading or evidence, with reference to the several features of radical difference made manifest by the pleading and proof in the instant case. The differences in regard to the procedure, the elements of damages, and the defenses, were not involved or referred to, so far as the record or the opinion in the Cox case discloses; nor was the special act of 1878 incorporating the Louisiana Western R. R. Co. before the court for consideration in that case. (See testimony of Dart, bill of exceptions, Tr. p. 71).

In the case of Slater v. Mexican National Railway Company, 194 U. S., 48 L. Ed., 900, it is held that a Federal court is without jurisdiction on account of the dissimilarity of the laws of Mexico and Texas with regard to the remedies and measure of relief allowed for injuries resulting in death (citing in this connection the Texas cases above cited, and apparently restricting or limiting the decision of the Cox case above mentioned). Chief Justice Fuller, Justice Harlan and Justice Peckham dissent, citing, among other cases, that of Mexican Central v. Mitten, and commenting on the fact that the Supreme Court of Texas refused writ of error in the latter case, the probable reason for which we have heretofore mentioned.

In the Slater case Justice Holmes, delivering the opinion of the court, says:

"As Texas has statutes which give an action for wrong fully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore & O. R. Co. 168 U. S., 445, 283 42 L. Ed., 537, 18 Sup. Ct. Rep., 105. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligato, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackl., 71; Dennick v. Central R. Co., 103 U. S. 11, 18; 26 L. Ed., 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (Smith v. Condry, 1 How., 28, 11 Ed., 35), but equally determines its extent.

It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

After discussing at length the inconsistencies between the remedies afforded under the Mexican and under the Texas laws, the learned Justice continues:

"Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas State courts. Mexican Nat. R. Co. v. Jackson, 89 Tex., 107, 31 L. R. A., 276, 33 S. W., 857; St. Louis, I. M. & S. R. Co. v. McCormick, 71 Tex., 660, 1 L. R. A., 804, 9 S. W., 540. The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them, notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See *Mulhall v. Fallon*, 176 Mass., 266, 54 L. R. A., 934, 57 N. E., 386."

Chief Justice Fuller, in his dissenting opinion, again takes issue with the holding of our Texas court in the case of *Mexican Railway Company v. Jackson*, 89 Tex., 107, and says:

"The question is one of general law, and we are not bound by that ruling."

And in this connection the learned Chief Justice cites the opinion of the Court of Civil Appeals in the case of *Mexican Central Railroad Company v. Mitten*, 13 Tex. Civ. App., 36 S. W., 282, and emphasizes the fact that writ of error was refused by the Texas Supreme Court in this latter case—the reason for which refusal we have heretofore suggested as being that, in the *Mitten* case, there was no pleading or evidence in the record showing the local laws upon the subject in the jurisdiction of Mexico, and the presumption was indulged that the right of action existed there in accordance with the "universal law."

Now, in view of the principles announced and applied in the above quoted decisions, let us analyze and compare the status of the laws in the two States of Texas and Louisiana bearing on the several features involved in this action.

First.

There is a vital conflict and inconsistency between the laws of the two States as to the measure of damages and extent of recovery awarded for injuries resulting in death.

In this connection we refer to the testimony of Mr. H. P. Dart and the Louisiana decisions cited by him, who gives the following summary of the damages allowed in such cases, according to the statutory laws and decisions of the State of Louisiana:

"(1) The damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the acci-

dent and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

285 “(2) The loss by deprivation of the decedent’s society and his aid and support, also the expenses of his death and burial.

“On both propositions see *Eichorn v. R. R. Co.*, 114 La., 718 et seq., 38 S. R., 526; *Payne v. Lumber Company*, 117 La., 991; 42 So. Rep., 475; *Dobyns v. R. R.*, 119 La., 82; 43 So. Rep., 934.

“(3) To these elements the court has now added recovery for mental suffering of the survivor. See *Stewart v. R. R.* 112 La., 767; 36 So. Rep., 676, as applied in *Graham v. Telegraph Company*, 109 La., 1070, 34 So. Rep., 91; *Parker v. Lumber Co.*, 115 La., 463, 39 So. Rep., 445.

“(4) Vindictive or punitive damages are not permitted in actions for personal injury against a corporation. *McGary v. City*, 12 Reb. (La. Reports), 675. *McFee v. R. R. Co.*, 42 La. An. 790. *Patterson v. R. R. Co.*, 110 La., 797, 34 So. Rep., 782.”

In addition to these elements the witness Dart states other rules and proceedings on the subject of the minority and majority rights of children, and the alimony of the widow, which indicate variances between the law on measure of damages and procedure obtaining in the States of Louisiana and Texas, which in large measure at least would involve a source of difficulty to the Texas courts in their practical application.

We submit that the holdings and expressions of the courts in the case of *Railway Company v. McCormick*, 71 Texas, 660, and of the Supreme Court of the United States in the case of *Slater v. Mexican National Railway Company*, 194 U. S., 48 L. Ed., 900, are directly applicable to the status of the present case, in respect to these conflicts and inconsistencies in measure and extent of damages and right to recover, according to the laws of the respective jurisdictions.

In the *Slater* case it is said:

286 “But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (*Smith v. Condry*, 1 How., 28, 11 L. Ed., 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.”

The learned judge who tried the instant case without a jury evidently followed the view above quoted, bearing on the extent of the right under the *lex loci*; for he, upon the trial of the merits, admitted, over the objection of defendants’ counsel, the evidence of the law of Louisiana as to measure of damages and extent of recovery, showing these elements and measures to go beyond the measures allowable under the laws of Texas. (See bill of exception No. 6, Tr. pp. 93-99). And presumably these matters entered into the trial judge’s consideration as a basis of his estimate and judgment in fixing the amount of recovery in this cause in the aggregate sum of sixteen thousand dollars; and yet there is no law of Texas in such case which, by analogy, would justify or support, through comity

or otherwise, such an element of recovery as "damages which the decedent might have recovered, had he lived, such as compensation for his pain and suffering," etc., or the loss to plaintiffs by "deprivation of the decedent's society and his aid and support, also the expense of his death and burial," or "mental suffering," of the surviving widow and children.

The language of Justice Stayton in the case of T. & P. R'y Co. v. Richards, 68 Texas, 375, we submit, is peculiarly applicable in this connection. He says:

"We know of no rule of law which would authorize a court of this State to give effect to the laws of another State conferring such right as is claimed in this case, when the laws of this State declare that the same facts, transpiring here, as are made the basis of appellee's claim, could confer no right whatever to the relief sought. The most liberal State comity cannot, in reference to such a matter as
287 that before us, require one State to enforce the laws of another when in conflict with its own law."

Second.

There is a radical conflict between the laws of the two States on the doctrine of fellow-servants as a defense, the common law on this subject being qualified in the State of Louisiana by the decision of its courts, and there being in the latter State no statutory limitation on the defense as made by the statute of Texas.

Jones vs. S. P. Co., 114 Fed. Rep., 973.

Hale v. K. C. S. R'y Co., 120 Fed. Rep., 735; 57 C. C. A., 149.

Satterley v. Morgan, 35 La., 166.

Towns v. Company, 37 La., 632.

Bell v. Globe Lumber Co., 31 So., 994 (La. Sup. Ct.).

Bandie v. S. P. Co., 7 So. Rep., 792.

In this connection, and without quoting from the authorities cited, we refer to the testimony of H. P. Dart in answer to the seventh direct interrogatory, which was introduced in support of the plea to the jurisdiction. He says:

"On the 1st of June, 1905, and for many years prior thereto, the statutory authority for an action for personal injuries by the servant against the master was the Articles 2317 and 2320 of the Civil Code above quoted. * * * There is no statutory or codal provision in Louisiana on the subject of the relation of fellow servants, as a defense to the master. The question came before the Supreme Court of Louisiana in May, 1851, for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. * * *

"I would answer further, on the case stated, that the engineer and fireman in the operation of the locomotive are fellow servants.

* * *

288 "They (the engineer and fireman in this case) would be fellow-servants. I have cited the decisions in the former answer."

This conflict between the laws of Louisiana and Texas on vital features of the defense in this case is demonstrated in that it is an example of the very hypothesis used by Justice Gaines as an illustration in the case of *R'y Co. v. De Harn*, 86 Texas, 71.

In that opinion it is said: "In order to illustrate this, let us take the case of a servant of a railway company who is injured by reason of the negligence of another employé of the same company. By statute, in some of the States of our Union, such corporations are held responsible for injuries which result from the negligence. Let us suppose that in a State where the common law as to such liability is still in force, one employé of a railway company is injured by the negligence of his co-employé, and that the person injured is carried into a State where the Statute has established a different rule, and there dies; would it be proper for the courts of the State where the death occurred to hold the company liable for the consequences of the negligence of its servants, when, according to the laws of the State where the negligence occurred, no action would lie for such negligence?"

And in further support of our position on this conflict between the laws of Louisiana and Texas in the matter of defense, we again quote the language of the Supreme Court of the United States in the case of *Slater v. Mexican National R'y Co.*, 194 U. S., 48 L. Ed., 900:

"But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow the plaintiff to come here absolutely depending on the foreign law as for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

289 **Third.**

From the evidence there appears to be more or less conflict between the laws of Texas and of Louisiana on the defense of risks assumed by the contract of employment; and this is especially true in view of the provision in the incorporating act of the Louisiana Western Railroad Company, whereby the latter is given rights of immunity and exemption from liability in this case, thus establishing rights and policies which do not obtain in Texas, nor exist at Common Law.

The Louisiana Western Railroad Company was chartered by act of the Louisiana legislature, approved March 30th, 1878, and this company, since that date, has acted, constructed and operated its railroad for the transaction of its business in accordance with the provisions of that charter. Section 17 of this act, set forth in the foregoing statement absolutely relieves and exempts the company from any liability, such as that which is sought to be charged in this case. At the time of passing and approving this incorporating act there was no provision in the Constitution of Louisiana pro-

hibiting it. Provisions inserted subsequently in the Constitutions of 1879 and 1898 against special privileges, etc., could have no effect towards revoking or invalidating the privileges and rights theretofore extended to the Louisiana Western Railroad Company. This is practically adjudicated by the Louisiana court in *Pecot v. Police Jury*, 41 La., 707; 6 So. Rep., 677.

Referring to this incorporating act, the witness H. P. Dart testified:

"I do not know of any amendment or alteration by the legislature, or any other authority, altering or eliminating the language or effect of Section 17 of said Act, as quoted." (See bill of exception, Tr. p. 64.)

Again he says:

"I am not aware of any decision construing this particular provision of the charter of the Louisiana Western Railway Company. Other provisions of the same statute have been passed upon by the Supreme Court, thus the provision giving that corporation the right to expropriate property by special procedure was recognized and enforced in *Louisiana Western R. R. Co. v. Central & Improvement Company*, 119 La., 927, 44 So. Rep., 732."

Again, referring to this provision, Section 17, this witness says, in answer to cross-interrogatories:

"I should consider the provision valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in Louisiana, it would seem reasonable, where the legislature has the right to create a corporation by special act, that it would safeguard the grant or regulate or control rights or privileges under it, with the same validity that it could make the original grant." (See bill of exception, Tr., pp. —.)

And again this witness says:

"I am aware of no constitutional provision which nullifies or neutralizes the provisions of the charter aforesaid." (See bill of exception No. 1, Tr. p. 81.)

It is held by the courts of Texas that a railway charter is a contract between the State and the company, within the meaning of the Constitution, and cannot be effected by subsequent legislation or constitutions. (*H. & T. C. R. R. Co. v. T. & P. Ry. Co.*, 70 Texas, 656.)

An act of the legislature must be held valid unless some superior law in express terms or by necessary implication forbids.

Harris County v. Stewart, 91 Texas, 143.

Whitemore v. Belknap, 89 Texas, 273.

Blum v. Nooney, 69 Texas, 4.

Orr v. Rhine, 45 Texas, 353.

In the case of *U. & C. Insurance Company v. Chawning*, 86 Texas, 654, it is said that the good or bad policies of a law are legislative questions over which the courts have no jurisdiction.

The provisions of Article 110 of the Constitution of the State of Louisiana are, in substance and meaning, the same as those

of the Texas Constitution, and the same as the Constitution of the United States, in prohibiting the impairment of the obligations of a contract by subsequent legislation.

At the time of the passage and approval of this incorporating act, March 30th, 1878, there was in the State of Louisiana no right of action accruing immediately to any of the relatives for injuries resulting in death, this right of action being created as matter of general law by the amendment of 1884. We insist that, in view of the prior enactment of this charter, with its provision of immunity, the amendment of 1884 would not be construed as embracing or contemplating within the legislative intent, the liability of the defendant Louisiana Western Railroad Company in a case such as this; or if so intended, then that such amendment to this extent would have the effect of impairing the obligation of a valid and vested contract right in the railroad company, and hence would be violative of the Constitution of the State of Louisiana and of the United States of America; and this contention is embraced and covered by pleadings in bar, and will be embraced more fully in subsequent portions of this brief. However, it is not our purpose to anticipate in this discussion the several questions that may arise in reference to the validity of this charter provision and its effectiveness as a plea in defense and bar of this action. Assuming that it is to be ultimately held invalid and of no force, for the reason that it encroaches upon the police power of the State, or for other cause, the question to be considered at this stage of the case and in connection with our plea in abatement is whether the courts of Texas, in a proceeding brought before it involving a transaction occurring in the State of Louisiana, will undertake to pass upon and denounce as invalid a legislative act of that State, when the evidence indicates, without dispute, that it has never been so adjudicated by the courts of the State of Louisiana itself, but so far as the evidence discloses, has been upheld and acquiesced in and adopted as in line with the policies of that State.

In conclusion, without going into further detail upon contradictory features of the laws of the two jurisdictions of Texas and Louisiana, we merely call attention to the radical differences in the relative powers and discretions of the trial and appellate judges and the juries in the trial of fact cases, and to the fact that the general law of master and servant prevailing in Louisiana has its source, not in the common law, as in Texas, but in specific legislative acts and code provisions, and these acts and codes, in turn, are based on the principles of the civil law, and being, in the language of Mr. Dart, "*sui generis*, a conglomeration of many systems with the State statutes as a basis, and the impressions and convictions of the judges as a solution." (Tr. p. 69).

Second Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the second assignment of error urged on page 46 of appellants' brief, and the third assignment of

error urged and presented on page 67 of appellants' brief, and embraced in the second ground of their motion for rehearing, both of said assignments being to the effect that the court erred in overruling and refusing to sustain the general demurrers of defendants, for the reason that the plaintiffs' petition, on which trial was had, while showing that the injury and death of Miller occurred entirely within the State of Louisiana and beyond the limits of the State of Texas, yet contained no reference to nor declaration upon any right of action afforded by the laws of Louisiana in behalf of the plaintiffs for damages to them caused by such injury and death.

And in this connection the Honorable Court of Civil Appeals erred in further holding that such deficiency in the plaintiffs' petition, making it bad on demurrer, was cured for the purpose of demurrers by the reference to certain laws of Louisiana set forth, by way of abatement, in the answers of the defendants.

293

Statement.

By reference to the plaintiffs' original petition, it will be observed that while the allegations set forth the alleged circumstances and surroundings of the wreck, indicating that the injury to William T. Miller occurred on the railway of Louisiana Western Railway Company, entirely within the State of Louisiana, and that he died in said State from such injuries, there is not the slightest averment as to the laws of Louisiana, or that, in accordance with the laws of that State, the plaintiffs, or either of them, were entitled to recover. (Tr. pp. 2-10).

The defendants each interposed in their answers, in due order, general demurrers to plaintiffs' petition, and these demurrers in due time were submitted to the court and overruled, and to such rulings the defendants, and each of them, duly excepted. (Tr. pp. 36 and 37).

Authorities and Remarks

De Harn v. Mex. Nat. R'y Co. (T. C. A.) 22 S. W. 249.

De Harn v. Mex. Nat. R'y Co., 86 Texas, 71.

Mexican Continental R'y Co. v. Mitten, (T. C. A.) 36 S. W., 282.

Mexican Central R'y Co. v. Goodman (T. C. A.) 48 S. W., 778.

Id., 55 S. W., 372.

McDonald v. Mallory, 77 N. Y., 548.

Leonard v. R'y Co., 84 N. Y., 50.

Hyde v. R'y Co. 61 Iowa, 441; 16 N. W., 351.

Davis v. R'y Co. 143 Mass., 301; 9 N. E. 815.

Wooden v. R. R. Co., 126 N. Y. 10; 26 N. E., 1050.

State v. Clay, 100 Mo., 571; 13 S. W. 827.

Union Pacific R'y Co. v. Wyler, 158 U. S. 285; 39 L. Ed., 987.

294 In the case of *De Harn v. Mexican National Railway Company*, suit was brought in Texas District Court against the Mexican National Railway Company by plaintiff, for injuries to her son inflicted by the defendant in the Republic of Mexico, and resulting in death in the State of Texas. The petition alleged the facts, showing the injury and the location of it in the Republic of Mexico, and the loss to plaintiff, who was the mother of deceased, on account of the injury; but there was no allegation with reference to the laws of Mexico, or any right of action under its laws that would entitle plaintiff to recover. A general demurrer to the petition was sustained by the trial court, and, on appeal to the Court of Civil Appeals of Texas, decision was rendered, with opinion by Judge Pleasants, affirming the judgment of the court below. (See 22 S. W. Rep., 249).

This cause was taken to the Supreme Court of Texas by writ of error (86 Texas, 71) and the judgment of the trial court and the Court of Civil Appeals, sustaining the general demurrer, was there affirmed.

Justice Gaines, rendering the opinion of the Supreme Court, says: "It is settled law that the statute of a State which for a tort gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extra-territorial force; and in accordance with this rule it has been expressly decided in this State that for an injury inflicted in another State or Territory, which results in the death of the party injured, the surviving relatives have no right to recover in this State. *Willis v. Railway*, 61 Texas 432; *Railway v. Richards*, 68 Texas, 375; *Railway v. McCormick*, 71 Texas, 660.

* * * A seeming exception is, that if the law of the State where the injury is inflicted gives substantially the same right of action which is given by the law of the State where the suit is brought, and in favor of the same parties, by reason of the principle of comity, the right will be enforced in the latter State. * * *

295 "We use the phrase, 'a seeming exception' because it cannot in fact be deemed an exception to the general rule. That rule is founded upon the principle that the statutes of a State have no effect beyond its own limits, and that if the act or omission complained of be not actionable by the law of the State where it is committed, no action can properly be brought on it in another State, although, by the laws of the latter, the act would have been actionable if committed within its jurisdiction."

Again, in this connection, the court says:

"As to torts, at least, the laws of a State have no operation beyond its own limits. When, for example, the courts of one State sustain a recovery for an injury to person or property inflicted in another State, it is because the wrongful act is legally injurious in the State where committed, and not simply because it would have been actionable, if committed within the territorial limits of the jurisdiction of the forum."

The contention was made, upon the hearing of these demurrers in the court below, that, in the absence of any allegation of the laws

of the State of Louisiana, on the subject of the right of action such as that sued upon, our State courts would indulge the presumption that substantially the same right of action which exists in the State of Texas, under our statute, for injury resulting in death, exists in the State of Louisiana, and that plaintiff is entitled to rely upon this presumption for the purpose of curing his petition against demurrer.

In the case of Mexican Continental Railway Company v. Mitten (T. C. A.), 36 S. W. 282, involving personal injuries inflicted on plaintiff in the Republic of Mexico, not resulting in death, and in which there was no pleading or proof in the record as to the laws of Mexico on the subject, the Court of Civil Appeals of San Antonio sustained the action as being based on a common law tort, but, in that connection, by way of dicta, the court stated a distinction between a tort based on principles of common or "universal law" and

296 a tort depending for its existence on local statutes, and in derogation of or unknown to the common law, using the following language:

"Wherein the action is given by the statute, and is not one that arose at common law, it becomes necessary for the plaintiff to establish the existence of a law in the foreign State that gives the right of action as well as in the State where the case is tried. However, where the wrong is one for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign State, and the remedy will be applied."

And, in support of this view, the said court quotes the following authorities:

"Actions for injuries to the person, committed abroad, are sustained without proof as to the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries." (McDonald v. Mallory, 77 N. Y., 548) p. 283.

"The rule, no doubt, is that all common law actions for an injury in a foreign country are transitory in their character, and may be brought in another State or country beside that in which they originated. In contemplation of the law the injury arises anywhere and everywhere. Leonard v. Navigation Co., 84 N. Y., 50."

In the light of the decisions of our Texas courts hereinafter to be reviewed, that the Texas courts will not take judicial notice of the prevalence of the common law in other States, we suggest that the view of the San Antonio court that "the presumption will prevail that the common law is in force in the foreign State," is rather broad and that a more accurate statement of the rule to be applied in our Texas courts is that expressed in the language above quoted from the case of McDonald v. Mallory, 77 N. Y. 548.

In Union Pacific R'y Co. v. Wyler, 158 U. S., 285, 39 L. Ed., 987, a case in which the Supreme Court of the United States held that the original action based on the common law duty of the master

297 to exercise ordinary care in selecting fellow-servants having been amended by an action against the master for the negligence of a fellow-servant under a Kansas statute, changing the common law in this respect substantially as it exists in Texas by statute, used the following language:

"As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the States the laws of other States are treated as foreign laws which must be pleaded and proven. Sedgwick Statutory & Constitutional Law, 3631; *Hempstead v. Reed*, 6 Conn., 480; *Swank v. Hufnagle*, 111 Ind., 453; *Roots v. Merriweather*, 8 Bush., 397."

We are confronted with a considerable list of decisions by our Texas courts in which the presumption is said to be allowed in the absence of any showing to the contrary, that the laws on certain subjects in other States are substantially the same as the laws of Texas, but we have not found a decision involving a case such as this, which is based on a right of action created entirely by statute, and being in itself a statutory innovation on the general rule prevailing under the common law. We cannot conceive that it is logical for the Texas courts, without any showing by pleading or evidence before them, to assume the existence in a neighboring or foreign jurisdiction of a right of action which is contrary to the general rule, and to base this presumption solely on the fact that Texas itself has created, by its own legislation, a right of action for torts which concededly does not and cannot extend its obligations or benefits beyond the territorial jurisdiction of Texas. And we submit that our position on this demurrer is sustained, not only by the holding of our court in the *De Harn* case, but by the manifest logic and meaning of the language used by our courts in other decisions hereinafter to be rendered.

In the case of *R'y Co. v. McCormick*, 71 Texas, 660, in 298 which it was held by our Supreme Court that the courts of

Texas must decline jurisdiction of an action by a widow, founded upon the negligent killing of her husband in Arkansas, because the laws of that State are so dissimilar to the statute of Texas, it is said:

"Comity extends only to enforce obligations, contracts and rights under provisions of law of other countries which are analogous to those of the State where the litigation arises. When it is made to appear that the act complained of was committed out of a State, and it is shown that the laws of that State are similar to local statutes giving the remedy, the duty of taking jurisdiction would be indicated if the local courts will recognize the action as transitory."

Mark the language of this opinion: "And it is shown that the laws of that State are similar to local statutes." The clear meaning of this declaration by the court, we submit, is that, in order to make out a case of liability upon facts indicating injury in another State, it must be shown by the plaintiff (through pleading and proof) that the laws of that State are similar to local statutes giving the remedy. If the presumption is to be indulged for the purpose of the pleading, as contended by plaintiffs in this case, then why require the showing to be made by the proof? The showing by proof requires and implies the showing to be made by the pleading, and

vice versa. Of course, we are aware that in this McCormick case the facts with regard to the dissimilarities of the laws of the two jurisdictions were fully shown by pleading and proof, and the question of demurrer to the pleading, such as we have involved in the instant case, was not present; but what we wish specially to emphasize here is the significance of the language solemnly used by our Supreme Court in that case, expressing deliberately the general doctrine and the exception to it. The general rule, as stated by our Supreme Court in this case and in the case of *De Harn v. Mexican International Railway Company*, 86 Texas, 71, is that "the statute of a State, which for a tort gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extra-territorial force; and in accordance with this rule, * * * that for an injury inflicted in another State or Territory, which results in the death of the party injured, the surviving relatives have no right to recover in this State." (*De Harn v. R'y Co.*, 86 Texas, 71).

The exception which, as Justice Gaines says, is merely a "seeming exception," depends on a similar right of action in derogation of the common law, or unknown to that law, existing by virtue of legislation in another State, appealing to the jurisdiction of our court on grounds of comity. We submit that it would be extremely illogical for our courts, in the absence of any pleading or evidence in the record, to presume the existence of those extraordinary facts necessary to invoke the "seeming exception," rather than to put that interpretation on the face of the pleading which conforms to the general rule, as stated.

Except in so far as this point may have been involved and considered in the *De Harn* case, we find no further expression by our Supreme Court upon the very question here involved. However, we find it discussed forcibly and at some length by the Texas Court of Civil Appeals in the case of *Mexican Central Railroad Company v. Goodman*, 48 S. W., 778, which was a suit instituted by Samuel Goodman to recover damages inflicted upon himself and wife through being ejected from a train belonging to appellant, in the Republic of Mexico. After the institution of the suit the death of Samuel Goodman was suggested, and Cora Goodman, his surviving wife, was allowed, as administratrix of the estate, to prosecute the suit. A trial was had, and resulted in a verdict and judgment for appellee. The damages claimed arose out of the refusal to honor the tickets held by appellant and her husband, and their ejection from the train. The defendant excepted to the petition, on the ground that *that* it showed that the injury was inflicted in the Republic of Mexico, and "Fails to allege that the cause of action of appellee's husband would survive to her under the laws of that country."

300 Judge Fly, in rendering the opinion of the court, used the following language:

"The damages sued for were injured to the person of Samuel Goodman and his wife, the appellee in this case, and the action was maintainable in Texas, without any allegation that such suit was au-

thorized by the laws of Mexico, because such actions are sanctioned by the universal law; but the further and more difficult question arises, did the action of Goodman survive to his wife, under the law of the forum, there being no allegation or proof as to the laws of Mexico on the subject? Under the common law, as well as the civil law, the cause of action brought by Samuel Goodman for damages for his personal injuries would not survive his death. Citing *Watson v. Loop*, 12 Tex., 12; *Taney v. Edwards*, 27 Tex., 224; *Gibbs v. Belcher*, 30 Tex., 81; *Railway Co. v. Richards*, 68 Texas, 375. It follows, therefore, that the action, as to the personal injuries sustained by Samuel Goodman, did not survive to his wife, unless the presumption will obtain, in the absence of proof, that the foreign law is the same as that of the *lex fori*. The matter must be viewed as though Mrs. Goodman had originally instituted the suit, no strength being added to the action by the fact that it was instituted by the husband during his lifetime. Did she have such cause of action after the death of her husband? We think not. Had the action been one that she could have brought at common law, it would be transitory, and could be instituted anywhere that the offender might be found; but, adhering to our opinion in *Railway Co. v. Mitten*, 13 Tex. Civ. App., 653, 36 S. W., 282, we hold that 'where the action is given by statute, and is not one that arose at common law, it becomes necessary for the plaintiff to establish the existence of a law in the foreign State that gives the right of action, as well as in the State where the case was tried.' In the case of *De Harn v. R'y Co.*, 86 Tex., 68, 23 S. W., 381, it is said: 'It is settled law that the statute of a State which for a tort gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extra-territorial force.'

The only right Mrs. Goodman has to damages to the person of her husband after his death arises by virtue of a statute of this State, Rev. St. 1895, Art. 3353a. In the case of *Tempel v. Dodge*, 89 Tex., 69, 32 S. W., 514, and 33 S. W., 222, it is said: 'In the absence of proof, the court will presume the law of another State to be the same as the law of this State, and will not presume the common law to prevail.' This language is broad enough to cover every action, whether arising out of tort or contract, and can be reconciled with the language of the *De Harn* case only upon the hypothesis that the latter opinion had reference to cases arising out of contracts, and not to those arising out of torts. The opinion in the *De Harn* case is supported by numerous authorities. *McDonald v. Mallory*, 77 N. Y., 548; *Leonard v. Railway Co.*, 84 N. Y., 50; *Hyde v. Railway Co.*, 61 Iowa, 441; 16 N. W., 351; *Davis v. Railroad Co.*, 143 Mass., 301; 9 N. E. 815; *Wooden v. Railroad Co.*, 126 N. Y., 10, 26 N. E., 1050; *State v. Clay*, 100 Mo., 571, 13 S. W., 827.

"We are of the opinion that the cause of action, so far as it is based upon the injuries inflicted upon the mind and body of Samuel Goodman, died with him, unless it could be shown that there is in

Mexico a similar statute to that of this State, which causes such actions to survive."

The Honorable Court of Civil Appeals, in its decision in the Goodman case, above quoted, suggests a distinction between actions arising out of tort and actions of contract, as a basis for reconciling the expression quoted of the Supreme Court in *Tempel v. Dodge*, 89 Texas, 69, and the true explanation we will not here discuss, but respectfully submit that there is a much stronger reason against applying the rule of presumption in aid of plaintiffs' pleading in the instant case than in the case of the ordinary common law tort. For our Texas courts to indulge the presumption that a foreign State has a local law giving rights of action for injuries resulting in death would be an inference in derogation of the common law, or, to use the phrase of Judge Fly, in the decision last quoted, it would be to presume an exception to the "universal law."

302 While the courts of Texas, in the absence of an affirmative showing as to the laws of another State applicable to the subject-matter, have adopted the practice of presuming the laws of such State substantially similar to those of Texas, or to speak more accurately, have followed the laws of Texas, under such circumstances, so far as those were applicable, we do not conceive that our courts have meant to adopt a policy of inviting litigants into the court on pleadings that show less than a *prima facie* case, and much less have they reached the point at which the jurisdictional facts will be presumed in favor of a suitor so that he may have a standing in court upon a petition lacking in some of the elements essential to the court's jurisdiction over the subject-matter.

Nor do we understand that the decision in *Tempel v. Dodge*, 89 Texas, 69, or other cases following it, is to be construed as overruling that respectable line of authorities in our State, holding that the courts of Texas will not take judicial notice of the laws of another State, and especially of its statutory laws, but will require the party relying on such laws for relief to plead and prove them. (*Bryant v. Kelton*, 1 Texas, 434; *Smith v. Smith*, 1 Texas, 625; *Jones v. Laney*, 2 Texas, 342-350; *Hill v. George*, 5 Texas, 91; *Trigg v. Moore*, 10 Texas, 200; *Bradshaw v. Mayfield*, 18 Texas, 28; *Anderson v. Anderson*, 23 Texas, 641; *Faulk v. Faulk*, 23 Texas, 653; 11 American Decisions, 784, Notes; 89 American Decisions, 672, Note; 4 L. R. A., 42, Note.)

In *Bryant v. Kelton*, 1 Texas, 434, where it was sought to have the court admit certain certificates of proceedings in another State, our Supreme Court says:

"The proof on this subject is not sufficiently explicit; it only shows that the clerk, as such, was the keeper of the records of bills of sale, etc., without showing that he was made so by law. The law should have been proven, as any other fact; if it was only a usage that had acquired the force of law, it should have been proven as such; if it was a written law, a statute, it should have been proven by the production of the statute."

In the case of *Smith v. Smith*, 1 Texas, 625, our Supreme Court, following its decision in *Bryant v. Kelton* above cited, held that it was necessary to plead and prove the laws of Missouri on the subject-matter of the controversy. The court says, in this connection:

"The form, validity, and effect of the record, and of the probate, if any be required, must depend on the provisions of some local statute, and this should have been proved, before the competency or force of the evidence could be determined. We cannot judicially know, without proof of the law, whether such an instrument is authorized to be recorded, * * * nor the legal effects of the production of a copy of such a record in a court of justice."

In the case of *Jones v. Laney*, 2 Texas, 348, our Supreme Court, following its former decisions, refused to take judicial notice of the laws of the State of Georgia or Mississippi, and used the following language in this connection:

"The statutes of a State cannot be judicially known to the courts of another State; they must be proven as other foreign laws. The court can only judicially know the acts of Congress, and public treaties."

In the case of *Hill v. George*, our Supreme Court, following its former decisions, refused to take judicial notice of the laws of Alabama, and in its opinion used the following language:

"It is the settled law of this court that the statute laws of other States of this Union, and the laws of foreign countries, are facts that must be proved by competent testimony before they can be noticed. (2 Tex., 348.)

"If, as we have shown, the right to collect interest does not exist by the common law, but is dependent, exclusively, upon the statutes of the different countries for its existence; and if the court cannot take judicial notice of them, it is not easy to perceive upon what principle they would be admitted in evidence, without an allegation corresponding with such proof."

We call attention to the close analogy which this observation of our Supreme Court bears to the status of the instant case.

304 The statutes giving right of action for injuries resulting in death are essentially local, and do not exist at common law, and if, as we contend, the courts of Texas cannot take judicial notice of such statute of another State, how could they be proven so as to afford a basis for recovery on them "without an allegation corresponding with such proof"?

In the case of *Trigg v. Moore*, 10 Texas, 200 our Supreme Court, following its former decisions, declined to take judicial notice of the statutes of the State of Arkansas, and in this connection said:

"But, in his plea, the defendant avers that the cause of action, as against the plaintiff, was barred by the statute of limitations of the State of Arkansas at the time of the institution of suit against him in that State, and that consequently he might have successfully resisted a recovery. The defendant having thus pleaded the bar of the statute of limitations of the State of Arkansas, it devolved on

him to prove it. This court has repeatedly decided that it will not judicially take notice of the laws of other States, but they must be averred and proved, as other facts. Whether, therefore, the defendant's plea was true or not, was a matter which the court could not judicially know, but which it devolved upon the defendant to prove."

If, as contended in the instant case, there being no allegation on the subject of the Louisiana laws creating a right of action for injuries resulting in death, and no proof on such subject, the court had the right to presume, for the benefit of plaintiffs, that such laws existed, and were substantially the same as the Texas statute, why should not our Supreme Court, in the case of *Trigg v. Moore*, have indulged the presumption that the Arkansas statute of limitation existed and was substantially the same as ours, as alleged by defendant in that case? We submit that the act of presuming the existence of the Louisiana statute for injuries resulting in death, and its similarity to that of Texas, involved necessarily and essentially the process of judicial knowledge.

305 In the case of *Bradshaw v. Mayfield*, 18 Texas 28, it was held by our Supreme Court, through Chief Justice Hemphill, that our courts are not authorized to take judicial notice of the fact that the common law prevails in another of the States, though it may require very slight proof to establish the fact. In this connection the court says:

"The objection urged to the charge is that it was not alleged in the pleadings, nor was it in proof, that the common law was in force in Tennessee. It is a general rule that the laws of foreign and sister States must be alleged and proven as facts, before they can become the rule of decision; and if not so established, the rights of parties must be determined by our own laws. * * * The rule is corollary from the position that the several States, as to the effect of their respective legislation, are foreign to each other. In some of the States it is presumed that the common law prevails in certain other States, and, on a common law question, such law will be assumed to be the same as that of the State where the court which is to adjudicate upon the matter sits. (*Cowen & Hill*, 2nd Vol., p. 328; 10 Wend., 75, 78; 1 Mass., 103; 2 Id., 44; 1 Pick., 415, 417; *Legg & Legg*, 8 Mass., 9.)

"This would be deciding, to a certain extent at least by the law of the forum; for the common law as to the matter in controversy might have a construction in the State where the trial is had, variant from that given to it in the State where the contract was made or the act done. It requires but slight proof to establish the fact that the common law prevails in a particular State; and there are various modes in which this fact, when once alleged, may be established. The practice has been, in this State, either to admit the fact, or establish it by proof, and we see no good reason to depart from the rule."

In the case of *Anderson v. Anderson*, 23 Texas 641, our Supreme Court, following its former decisions, refused to take judicial notice of the laws of Alabama, and Chief Justice Wheeler, in render-

ing the opinion, used the following language in this connection:

306 "Nor did the court err in refusing to instruct the jury upon the law of Alabama. There was no evidence of that law, and it is well settled that the court will not, judicially, take notice of the law of another State."

In the case of *Faulk v. Faulk*, 23 Texas, 634, the Supreme Court, following its former decisions, refused to take judicial notice of the laws of Louisiana, and in this connection Chief Justice Wheeler, delivering the opinion of the court said:

"No question can arise upon the record, as to the effect of the instrument, by the law of Louisiana; for the reason that there is no averment or proof, respecting the law of that State. The court, therefore, rightly adjudged the property in question to the plaintiffs."

Upon a careful examination and analysis of the decisions in *Temple v. Dodge*, 89 Texas, 68, and other decisions in that line, it will be observed that there is no conflict between the practice recognized and followed in those decisions and the holdings of our Texas court in the case of *De Harn v. Ry. Co.*, 86 Texas, 71, and in *Railway Company v. Goodman*, 48 S. W., 778. Since the decisions in the *De Harn* and *Goodman* cases, the San Antonio Court of Civil Appeals (*Whalen v. Bomkero*, U. S., 88 S. W., 259; *White v. Richardson*, 94 S. W., 202; *Southern Kansas Ry. Co. v. Burgess*, 90 S. W., 189), and the Supreme Court of Texas, have cited and followed repeatedly the practice announced in *Temple v. Dodge*, in cases where it was deemed applicable, without referring in a single instance, to the decisions in the *De Harn* and *Goodman* cases for the purpose of overruling or questioning them. The source of confusion mentioned by Judge Fly in his decision of the *Goodman* case consists, we believe, to some extent, in the improper use or construction of the word "presumed" or "presumption" in these decisions. The word "presumed" or "presumption" in reference to the laws or statutes of other States, as used in the case of *Temple v. Dodge* and other cases in that line, does not mean or imply judicial knowledge, but the very reverse. The essential basis of this rule of practice

307 is, that our Texas courts will not take judicial notice of the laws of other States; and whenever the exigency arises in the course of litigation before the Texas courts, in which the laws of the foreign State might become applicable for determining rights if shown to the court, and they are not shown by appropriate pleading and proof on the part of the person seeking relief under them, the courts of Texas, in such event, will simply repose upon and administer the laws of Texas judicially known to them, in so far as the same may be applicable to the subject-matter of which they have cognizance, and will never take judicial notice of the foreign laws for the relief of the party claiming under them. Perhaps a clearer statement of this rule is that when a party to litigation fails to show to the court the foreign law relating to his rights in controversy before it, the court will simply administer the laws of Texas, if any there be, applicable to the subject-matter of the controversy. (Brad-

shaw v. Mayfield, 18 Tex., 28.) That this is the true explanation and reason of the practice laid down in *Tempel v. Dodge*, and other decisions following it, making these decisions thoroughly in accord with and even founded upon the broader rule that our courts will not take judicial notice of the laws of other States, is fully illustrated by the language of Justice Brown, in the case of *Blethen v. Bonner*, 93 Texas, 141, a decision, by the way, which appellees have relied upon in the court below as sustaining their contention to the contrary.

In that case our Supreme Court, through Justice Brown, in the opinion, used the following language:

"Under the laws in force in the State of Texas, at the time Blethen claims to have acquired the money with which he bought the land, the wife, upon the facts proved, would be entitled to one-half of it. Blethen and those who claimed under him pleaded that the laws in force in the State of Massachusetts at the time the money was acquired made it his separate property. The pleadings presented the issue, what was the law upon this subject in the State of Massachusetts between the years 1863, the date of the marriage, and 1878, the time of Blethen's removal to Texas? The burden was upon the defendants to prove the law under which they claimed rights different from those accorded to them by the laws of Texas. The paragraph of the Constitution of Massachusetts introduced in evidence does not establish that the common law was in force in that territory at the time it was adopted, and the alleged right had its origin, if, indeed, such presumption would be indulged after so great a lapse of time. There being no evidence of what the law upon the subject was in Massachusetts at the time in question, courts of this State must apply that which prevailed here, because it is the only applicable rule of decision known to them. *Crosby v. Huston*, 1 Tex., 203; *Bradshaw v. Mayfield*, 18 Tex., 21; *Porcheler v. Bronson*, 50 Tex., 555; *Railway Co. v. Baker*, 57 Tex., 422; *Tempel v. Dodge*, 89 Tex., 68, 32 S. W., 514, and 33 S. W., 222. If one seeks in our courts to support a claim to property different from that secured by the laws of Texas, it is reasonable that he should be required to inform the court what the law is that he seeks to have enforced in this jurisdiction. It is true that in many of the States—perhaps in the greater number—in the absence of evidence, the courts will presume the common law to be in force in a sister State; but the rule stated above is established in this State by an unbroken line of decisions, and we believe it furnishes a safer guide than the indulgence in presumption, for we know that frequent radical changes have been made by the legislatures of most of the American States in the rules of the common law, especially those which govern the rights of married women."

Paraphrasing the language of Justice Brown in the above quoted opinion, and applying it to the instant case, we contend that the burden was on the plaintiffs to plead "the law under which they claimed rights different from those accorded to them by the laws of Texas"; and failing to do this, they were relegated under this rule of practice to the Texas law, if any was applicable, to extend

to them a right or remedy. But according to the law of Texas there was no right or remedy in favor of plaintiffs applicable
309 or extending to the facts shown by the petition to have occurred beyond the limits of the State of Texas.

In the instant case, the petition alleges fully the causes, surroundings and circumstances of the injury and death, such as would undoubtedly constitute a cause of action under the statutes of the State of Texas, provided it were further shown by the pleading that the injury occurred in the State of Texas. But without this express averment of the location of the injury in Texas the petition would be essentially bad on demurrer. The plaintiff's petition is not simply defective in being silent on the location of the injury so as to leave it susceptible of being cured by supplying this element through inference or intendment, as against general demurrer; but the petition expressly sets forth and describes the location of the injury and death at a place entirely beyond the limits reached or covered by the statutes of Texas, to wit, within the State of Louisiana and beyond the limits of Texas. The Texas court would have judicial notice of the general Texas statute, but this statute, though known, could afford no authority for right or relief to plaintiffs for injuries as alleged and located in their petition; at most, the existence of this Texas statute, judicially known, in this cause would be a permissive circumstance to be considered by the Texas courts merely in determining whether they, on principles of comity, would undertake to administer the laws of the jurisdiction in whose territory the injuries and death occurred, for the purpose of upholding the right and affording the relief, if any, allowed by such foreign laws. The authority and existence of the legal right (if any) in the foreign jurisdiction where the facts occurred was just as essential a fact to the maintenance of the action as the facts and circumstances of the injury itself, which occurred in the foreign territory. (*De Harn v. Ry. Co.*, 86 Texas, 71.) The existence of the Texas statute and its consideration alone by the court could afford no right of action on the facts of the injury alleged in their petition, if this was the only law to be considered by
the court; and manifestly there was no cause of action dis-
310 closed by the petition that could be maintained. Taking the facts and surroundings and location of the injury as presented by the plaintiffs' petition, and considering this in connection with the Texas statute, judicially known to the court, and whose rights and remedies cannot possibly extend beyond the limits of Texas, it becomes judicially impracticable to assume the existence of a law of Louisiana substantially the same as that of Texas on the subject, which would extend the right of action to plaintiffs at the location of the injury. For at least in one essential the Louisiana law would have to differ from that of Texas, in this: that it must extend to and cover the Louisiana territory, and not that of Texas. The only theory on which the right of action could be predicated, under the facts recited in this petition, was that the laws of Louisiana applicable to the locality of facts afforded such right of action; and since the petition makes no reference whatsoever to the existence

or effect of any such laws of Louisiana, nor declares upon them, the only conceivable process of cognizance by the court upon the averments of the petition would be through judicial knowledge of the legislative acts of the foreign State, which would violate the settled law and practice of this State.

The plaintiffs have no standing in the courts of Texas for injuries in another State, causing death, except on principles of comity; and while seeking this comity the burden is on them, by pleading as well as proof, to bring their case within its principles; and the Texas courts cannot be required or expected to cure the plaintiffs' pleadings by the illogical presumption (implying judicial knowledge) of a local statutory law in a foreign jurisdiction, which in its nature, purpose and effect constitutes an exception to the general rule, and a departure from the "universal law."

Since the petition did not show any right of action or relief applicable to or covering the injuries located in Louisiana by its allegations, a vital jurisdictional fact was wanting which precluded our Texas courts from taking cognizance of the subject-matter, and left the petition subject to general demurrer.

- 311 Ward v. Lathrop, 4 Texas, 180.
 Haggerty v. Ward, 25 Texas, 144.
 Able v. Bloomfield, 6 Texas, 263.
 Hardeman v. Morgan, 48 Texas, 103.
 Mawthe v. Crozier, 50 Texas, 153.
 15 American & Eng. Enc. of Law (2nd Ed.), 188-190.

Referring to a state of case in which jurisdiction of the subject-matter did not clearly appear, Judge Bell, in Haggerty v. Ward, 25 Texas, 144, said: "It would result, if these propositions be true, that the jurisdiction of a court may spring out of and be made to depend upon presumptions alone, without any fact being shown to exist which gives jurisdiction, and even without the allegation of any fact as a foundation of jurisdiction."

In support of the general proposition that it was essential for the petition in this case to allege and declare upon the statutory law of Louisiana as a basis for recovery thereon, and that the omission of such averments rendered the petition subject to demurrer, we cite also the following authorities:

- Kahl v. Memphis, etc. Ry. Co., 95 Ala., 337; 10 So. Rep. 661.
 Nashville, etc. Ry. Co. v. Sprayberry, 9 Heisk. (Tenn.), 852.
 Id., 8 Baxton (Tenn.) 341.
 Hobbs v. Memphis, etc. Ry. Co., 9 Heisk. (Tenn.), 873.
 Jackson v. Pittsburg Ry. Co. (Ind.) 39 N. E. Rep. 663.
 Selma Ry. Co. v. Lacy, 43 Ga., 461.
 Hyde v. Wabash Ry. Co., 61 Iowa, 441.
 O'Reilly v. N. Y. Central Ry. Co. (R. L.), 42 A. & E. Railroad Cases, 50.
 Debevois v. N. Y. Central Ry. Co., 98 N. Y., 337.
 Enc. of Pleading & Practice, Vol. 5, p. 866, and notes.
 Cyc. of Law and Procedure, Vol. 13, pp. 340 and 345 and notes.

312 The Honorable Court of Civil Appeals, in its opinion, on pages 15 and 16 thereof, appears to concur in our view that the petition of the plaintiff, taken on the face of its averments, was subject to demurrer, but holds that the deficiency of the plaintiff's petition in this respect was cured, for the purpose of demurrer, by the pleadings of the defendants to the jurisdiction and by way of abatement, alleging the dissimilarity between the laws of Texas and the laws of Louisiana, if any, applicable to the occurrences complained of, the court citing, in this connection, the following authorities: *Lyon v. Logan*, 68 Tex., 524; *Boettler v. Tindick*, 73 Tex. 488; *Hill v. George*, 5 Tex., 89; *Grimes v. Hagood*, 19 Tex., 246; *Bourke v. Vanderlip*, 22 Tex. 222; *Gaston v. Wright*, 83 Tex., 282; *Bank v. De Berry*, 105 S. W., 1000.

This holding of the Honorable Court of Civil Appeals is in line with the contention made by appellees in their brief, and to which we replied on pages 3 et seq. of our supplemental brief filed with leave of court after due notice to counsel, insisting that the authorities cited by the counsel and the court in this connection were not applicable to the status of the record in this cause. The pleadings of defendants referred to, it will be observed, make no positive allegation or declaration upon the Louisiana statute that could possibly coalesce or co-operate with the plaintiff's petition so as to cure it and make it good against a general demurrer. The holding of the Texas decisions cited is substantially to the effect that when the pleading of the plaintiff has omitted an allegation essential to his case, and defendant, by his pleading, affirmatively avers and thus supplies the missing allegation, and so admits it as a fact of record, it becomes competent upon such status of pleading for the plaintiff to introduce evidence in support of the allegation thus supplied by his adversary, and for the court to enter judgment in favor of plaintiff on such status of the record.

But such is not the status of the pleading in this case. The plaintiffs, in their petition, merely alleged the date, place and
313 cause of the injury and death, without any allegation as to the existence, nature or quality of a right of action in the jurisdiction of the occurrence, and with no reference to nor declaration upon the Louisiana statute. (*Kahl v. Memphis, etc. R'y Co.*, 95 Ala., 337; 10 So. Rep., 661; *Nashville, etc. R'y Co. v. Sprayberry* (Tenn.) 9 Heisk., 852; *Id.*, 8 Baxt. (Tenn.), 341; *Hobbs v. Memphis, Etc. R'y Co.* (Tenn.) 9 Heisk., 873; *Jackson v. Pittsburg R'y Co.*, (Ind.), 39 N. E. Rep., 663; *Selma R'y Co. v. Lacy*, 43 Ga., 461; *Hyde v. Wabash R'y Co.*, 61 Iowa, 441; *O'Reilly v. N. Y. etc. R'y Co.* (R. I.), 42 A. & E. Railroad cases, 50; *Debovoise v. N. Y. Central R'y Co.*, 98 N. Y., 377; *Enc. of Pleading and Practice*, Vol. 5, pp. 866, 867, Note 1; *Cyc. of Law and Procedure*, Vol. 13, pp. 340 and 345 and notes.)

The defendants, appearing for that purpose, and in due order of pleading, set forth in their answers their plea to the jurisdiction and in abatement, in which they alleged, not that the plaintiffs have a statutory right of action in Louisiana, and that same is similar to

the right of action for death in Texas, nor that they have any right in said State of Louisiana, but that the matters complained of having occurred in Louisiana, and the right of action (if any) in plaintiffs having arisen in Louisiana, the laws of that jurisdiction, and not of Texas, relating to the cause of action (if any) and the defenses thereto, would apply, and, further, that the laws of the State of Louisiana in the subjects involved were radically different from the laws of Texas on such subjects within its jurisdiction, thus precluding the Texas courts from taking cognizance of the cause on the grounds of comity. This was the effect of the plea to the jurisdiction, and substantially the same point was embraced and urged on the merits, as plea in bar, in due order of pleading, and after the rulings on the pleas in abatement and demurrers, which were duly excepted to in the order as made. (Tr., pp. 36 and 37.)

A cursory review of the rulings and other proceedings had upon the hearing of this cause will demonstrate the fallacy and
314 injustice involved in applying the rule asserted by appellees to eliminate the effect of the demurrers in this case. The record (see Tr. pp. 36 and 37) will show that before acting on the merits the court ruled, separately and distinctly, in their order, on (1) the pleas in abatement and to the jurisdiction, (2) the general demurrers, and (3) the special demurrers of the defendants, which particularly pointed out and specified the defects in the petition rendering it bad on general demurrer; and that the defendants excepted to these several rulings of the court in the order as made. There is nothing to indicate nor to create a presumption that the trial judge, in overruling the demurrers, took into consideration, as curing the petition, either the plea to jurisdiction, which had been heard already and overruled by him, or the plea in bar, setting up the conflict of laws, and thereafter to be heard and considered in its order on the merits. Surely defendants were entitled to have the petition of the plaintiffs construed and considered upon its own language, for the purposes of the demurrers. The injustice of sustaining the petition upon consideration of the demurrer, with the reserved and undisclosed purpose of justifying such a course by afterward transposing into it upon the trial on the merits an implied denial of the allegations in the plea, is manifest and practically demonstrated in this case. If the demurrers had been sustained, and plaintiffs thereupon had amended their petition, curing the omission pointed out, and for the first time setting up and declaring upon the statutory right of action in the State of Louisiana, with other appropriate allegations, this amendment would thus have involved a departure from law to law, amounting to the commencement of suit on a new and distinct cause of action on that date, January 30, 1909, more than two years after the accrual of such cause of action, and subject to be barred in this jurisdiction by the statute of limitation of two years of the State of Texas. Under such circumstances, the defendants could and would have specially plead such statute in bar of the
315 action, which they did under practically similar circumstances in the case of T. & N. O. R. R. Co. et al. v. Felix and Theresa Gross, a companion case to this, as set forth in the second

assignment of error, pp. 48 et seq., and the fourteenth assignment of error, pp. 168 et seq. of the appellants' brief in said cause. Thus, if the contention of counsel that the demurrer is to be eliminated and the petition cured as against the demurrers by reference to the defendants' pleadings, referred to, such practice would have the effect of depriving the defendant practically of the opportunity to plead specially and urge on the trial of the merits the statutes of limitation of the forum.

We confidently insist that the rule is not applicable to the record in this case; but if such practice should be indulged, and it were to be held that the plaintiffs' petition was cured by the allegations in the answer filed in this cause April 2, 1908, then, in view of the ruling by the court, leaving the petition to stand against the demurrer, rendering it impracticable for defendant to anticipate the position that would be taken, and to file a special plea urging the statute of limitation of Texas, we submit that, under the authorities, appellants would be entitled still to avail themselves of the statutes of limitations of the State in bar of the action and without such special plea. (Nelson v. Cooper, 108 Fed. Rep., 919; 48 C. C. A., 140; Hines v. Lumpkin (T. C. A.), 47 S. W., 819; McSween v. Yet, 60 Texas, 183; Tazewell v. Whittle 13 Gratt. (Va.), 329; Dreatzer v. Baker, 60 Wis., 179; 18 N. W., 776; Cyc. of Law and Procedure, Vol. 25, p. 1403; Cooper v. Lyons, 9 Lea (Tenn.), 600; A. & E. Enc. of Law (2nd Ed.), Vol. 19 p. 151; Enc. of Pleading and Practice, Vol. 13, p. 187, note 1.)

Third Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the seventh assignment of error urged by appellants and presented on pages 84 and 85 of their printed brief on file, and embraced in paragraph seventh of the motion for rehearing complaining that the trial court erred, to the prejudice of each of the defendants, in and by its judgment and decree and

in its conclusions of fact and law, for the reasons that there
 316 was a fatal variance between the plaintiffs' allegations and the facts proven, in this: that while the evidence introduced by and on behalf of the plaintiffs, over the objections of defendants, showing the existence of the statutory laws and codes of the State of Louisiana, and the construction thereof by the courts of said State, upon the existence and effect of which the judgment, if any, in favor of plaintiffs, must stand, yet there was no pleading on the part of the plaintiffs, as to the existence or the effect of such statutes and other laws of the State of Louisiana, to justify the admission of evidence thereof, or to support a judgment on such theory, and therefore the pleadings of plaintiffs do not justify or support the judgment as rendered on the evidence.

In this connection, the Honorable Court of Civil Appeals erred in holding that the omissions pointed out in the pleadings of plaintiffs were supplied by averments in the answers of defendants.

Statement.

By reference to the plaintiffs' petition (Tr. pp. 2-10) it will be observed that while the allegations are that the deceased Miller was injured as result of derailment of a passenger train on the railroad of the Louisiana Western Railroad Company, entirely within the State of Louisiana, and beyond the limits of the State of Texas, and that he died at the point of his injury, and that the plaintiffs are residents of the State of Texas, and were so at the time of the alleged derailment and injury, yet there is no allegation whatsoever as to any of the laws existing or obtaining in the State of Louisiana at the time the action (if any) accrued for the injury, or at the time of the trial.

The conclusions of fact and law prepared and filed by the trial judge (Tr., pp. 39-44) indicate clearly that it was his design and purpose to base his decision, and that he did so base it, upon the laws of Louisiana applicable to the facts of the occurrence, and this without regard to the want of allegations in plaintiffs' petition in reference to the existence or effect of such laws.

317

Authorities and Remarks.

The derailment and injury having occurred in the State of Louisiana and beyond the limits of the State of Texas, the laws applicable to this case, and according to which it must be tried, are the laws of Louisiana. (De Harn v. R'y Co., 86 Tex., 71; Willis v. R'y Co., 61 Tex., 432; R'y Co. v. McCormick, 71 Tex., 660).

The courts of Texas will not take judicial notice of the laws of Louisiana. (Faulk v. Faulk, 23 Tex., 664; Anderson v. Anderson, 23 Tex., 641; Hill v. George 5 Tex., 91; Jones v. Laney, 2 Tex., 348).

The judgment based on findings of fact which are not covered or embraced within the pleading of plaintiffs, cannot stand.

Denison v. League, 16 Texas, 408.

Morris v. Kasling, 79 Texas, 144.

Parker v. Beavers, 19 Texas, 410.

Black on Judgments, Vol. 1, Section 183.

"There is no rule that has ben so strongly enforced in this court as the rule that the allegations must be broad enough to let in the proof, and that no evidence not sustained by the *allegata* can sustain a verdict." (Denison v. League, 16 Texas, 408).

"There is no principal more clearly settled than that the complainant in a court of equity, as well as law, must recover, if at all, upon the identical case on which he has based his right to recover in stating his cause of action. * * * A party must be supposed to know the facts of his own case." (Parker v. Beavers, 19 Tex., 410).

Fourth Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the second and third assignments of error urged on pages 46 and 47, respectively, of appellant's brief, and embraced in the second ground of the motion for rehearing, to the effect that the trial court erred in overruling the defendants' demurrers to plaintiffs' petition, and in holding that the deficiency in the petition, making it subject to demurrer, was cured by certain pleadings in abatement of the defendants.

And in this connection the Honorable Court of Civil Appeals erred in affirming the judgment of the trial court against defendants, on the theory that the defective petition had been cured by the allegations in defendants' answers, thus disregarding the undisputed fact that the pleadings of defendants so relied on to cure the petition were not filed until more than two years after the cause of action, if any plaintiffs ever had, arose and accrued, and more than two years after the injury and death of the deceased, Miller, in the State of Louisiana, so that such case of action, if any, had become barred and extinguished by the operation of the statutes of limitation of the State of Texas of two years, and by virtue of the provisions of the statute of Louisiana creating the right of action, if any, in favor of the plaintiffs, upon which they must recover, if at all, herein.

Statement.

The answer of the Louisiana Western Railroad Company, whose allegations are referred to and relied on by counsel for appellees in this connection, as curing the deficient petition, was filed on the 2nd day of April, 1908, (Tr. pp. 16-22), and the amended answer of the Texas & New Orleans Railroad Company, which adopted the answer of its co-defendant, and on which trial was had, was filed on the 6th day of April, 1908. (Tr. pp., 23-31.) Miller and Gross were injured and died on June 1st, 1905, as result of a wreck on that date in the State of Louisiana. The statute or code provision of Louisiana embracing the amendment of 1884, giving a right of action to survivors on account of injuries resulting in death in that State, reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be." (St. of Facts, p. 101).

Authorities.

(1) The transition from the case in the petition of plaintiffs, as fixed by its allegation alone, to the case which would be made by a declaration on the Louisiana statutory right of action in favor of the survivors mentioned, for injuries resulting in death, claimed to be the effect of the filing of this answer, involved a departure "from law to law," such as to constitute the institution of a new and different cause of action.

R'y Co. v. Wyler, 158 U. S., 285-298; 39 L. Ed., 987.

Phoenix Lbr. Co., v. Houston Water Works Co., 94 Tex. 456.

Whalen v. Gordon, 95 Fed. Rep., 314.

Anderson v. Wetter, 69 Atl., 105; 15 L. R. A. (N. S.) 1003.

Boston & Maine R. R. Co. v. Hurd, 56 L. R. A., 193; 108 Fed. Rep., 116.

Enc. of Pleading & Practice, Vol. 1, pp. 569, 570.

(2) The right of action in favor of the survivor, under the Louisiana statute, obtaining for a period of one year only from the death, according to its own provisions, would lapse and become extinguished without the commencement of action upon it within that period, and thereafter would not exist as a right potential or enforceable anywhere.

Ross v. Kansas City So. R'y Co. (T. C. A.) 79 S. W., 626.

Boyd v. Clark, 8 Fed. Rep., 852.

Whalen v. Gordon, 95 Fed. Rep., 319.

Thereaux Administrator v. R'y Co., 27 U. S., 508; 64 Fed. Rep., 484.

Munos et al. v. So. Pac. Co., 51 Fed. Rep., 188.

320 Vol. 8, A. & E. Enc. of Law, p. 875.

Article 2315, Revised Civil Code of Louisiana, Merrick's Annotated Edition of the Civil Code of Louisiana, p. 559.

Vol. 19, A. & E. Enc. of Law, pp. 146-151.

Davis v. Mills, 194 U. S., 450-458; 48 L. Ed. 1067-1972.

The Harrisburg, 119 U. S., 199, 30 L. Ed., 358.

Cyc. of Law & Procedure, Vol. 25, p. 1021.

(3) Where a suit or action based on a statutory right of action is commenced after the lapse of the period fixed by the provisions of the statute in which the right of action can be prosecuted, such limit being a part of the right itself thus created by the statute, and not merely a matter of remedy upon it, the statute itself no longer furnishes even a prima facie right of action as a basis for recovery; and the rule requiring the ordinary statute of limitation to be specially plead, in order to avail as a defense and defeat the action, does not apply.

A. & E. Enc. of Law (2nd Ed.), Vol. 19, pp. 150, 151 and cases there cited.

Enc. of Pleading and Practice, Vol. 13, pp. 186 and 187, and Note 1.

Cyc. of Law and Procedure, Vol. 25, pp. 1020 and 1403, and cases there cited.

Fifth Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the fourth assignment of error, the fifth assignment of error, and the sixth assignment of error, urged by appellants and presented on pages 74, 78 and 81, respectively, of their brief, and embraced in paragraphs fourth, fifth and sixth of the motion for rehearing, complaining that the trial court erred in admitting the certain depositions of the witness H. P. Dart, over the objections of defendants, as set forth and for the reasons stated in the defendants' bills of exception No. 6, No. 5 and 321 No. 7, respectively, and for the reasons: (1) That the evidence offered and objected to was not admissible under the allegations of plaintiffs' petition; and (2) that the amended act of 1884, of the State of Louisiana, could not apply to the Louisiana Western Railroad Company in this case, because of a provision in the act of 1878, creating such corporation, and exempting it from such liability, and the failure of the Texas court to give full faith and credit to the provisions of such incorporating act of the Louisiana legislature would be contrary to the Constitution and statutes of the United States of America; and the amended act of 1884 undertaking to create the statutory right of action relied on, if applied to the Louisiana Western Railroad Company, would impair the obligation of a contract, and thus deprive the defendants of a right, privilege and immunity that they were entitled to under the Constitution of the United States of America.

Statement.

On the trial of this cause upon its merits, the plaintiffs offered in evidence the testimony of H. P. Dart, as an expert, to the effect that in the State courts of Louisiana certain statutes are the bases of cases involving actions or claims for personal injury, and that by the passage of the act of 1884 of the legislature of Louisiana there was created a right of action for injuries inflicted in the State of Louisiana resulting in death, and that under such act the plaintiffs in this case would be entitled to recover, also, that under this law, and according to the decisions of the Louisiana courts, the plaintiffs would be entitled to recover in such action the following items of damage:

(1) The damages the decedent might have recovered, had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness.

322 (2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

(3) The damage sustained by the plaintiffs for mental suffering on account of the death of deceased.

The defendants, and each of them, objected to the introduction of such testimony on the following grounds:

(1) That the proposed evidence was irrelevant and immaterial; (2) that the statutory right of action, and the rules of law pertaining thereto, as applicable to such injury and death, occurring in Louisiana, were nowhere alleged or declared upon as a basis of action by plaintiffs in their pleading, and hence the evidence proposed was not admissible, under the plaintiffs' pleading; and (3) that the right of action created, or attempted to be created, by the Louisiana statute of 1884, in behalf of the designated surviving relatives, for the injury resulting in the death of deceased, was so created, or attempted to be created, by the Louisiana legislature in the year 1884, and long after the passage of the act of 1878 incorporating the Louisiana Western Railroad Company in said State, and granting it the certain immunities and exemptions from liability expressed in Section 17 of said incorporating act, and after the said railroad company had acted in good faith in accepting the terms and provisions of said incorporating act, and acquired vested rights thereunder, and that the effect of the said amended act of 1884, creating, or attempting to create, such right of action as plaintiffs are asserting herein as against the defendants, tends to impair, and would impair, if enforced, the obligation of a contract, in violation of the Constitution of the United States and of the State of Louisiana and of the State of Texas.

Defendants' objections were overruled by the court, and plaintiffs were permitted to read and introduce the said evidence above mentioned, and to this ruling the defendants, and each of them, excepted in open court, and were allowed their bill of exception No. 6. (Tr., pp. 93-99.) The petition makes no reference to nor declaration upon any law of Louisiana as basis of recovery in this case. (See 323 Tr. pp. 1-10.) (See also bill of exception No. 5, Tr., pp. 91-93).

Authorities and Remarks.

(1) Evidence tending to show the existence of facts which are not alleged in the pleading as a basis of recovery, and which are not relevant or material to any issue made, are not admissible, and it is error to admit the same when objected to. This is elementary.

These laws of Louisiana bearing on the measure and elements of damage were substantial parts of the statutory right of action in that State; and the Texas court could not take judicial notice of them; and it was necessary to plead in order to prove them. (Hill v. George, 5 Texas, 91; Trigg v. Moore, 10 Tex., 200; Bradshaw v. Mayfield, 18 Tex., 28; Blethen v. Bonner, 93 Texas, 141.)

(2) The State of Louisiana having, by legislative act of 1878, created and incorporated the Louisiana Western Railroad Company, vested in it by Section 17 of that act a valid contract right of immunity and exemption from liability for injuries resulting in the death of its train operatives, such as Miller and Gross; and the amended statute of 1884 of the State of Louisiana, creating actions

in favor of certain relatives for injuries resulting in death, in so far as it might be intended to apply to defendants in this case, would impair the obligation of a contract, and thus violate the Constitution of the United States and of the State of Louisiana and of the State of Texas, and hence evidence of such statutory right of action brought about by said amendment, and the decisions construing the same, would be inadmissible.

Moreover, this provision of the incorporating act, according to the evidence in the record, was valid, and was the legislative act of a sovereign State which was entitled to full faith and credit from the courts of Texas.

Pecot v. Police Jury, 41 La., 707; 6 S. R., 677.

La. Western R'y Co. v. Central Improvement Co., 119 La., 927; 44 S. R., 732.

Heirs of Gassin v. Williams et al., 36 La. An., 187.

324 St. Julian v. Morgan's Louisiana & Texas R. R. & S. S. Co., 39 La., 1063.

For the testimony of H. P. Dart in this connection, supporting our contention that Section 17 of this incorporating act was valid, and that it would not be affected by the subsequent act of 1884, we refer to the testimony of H. P. Dart, St. of Facts, pp. 90-92.

Sixth Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the eighth assignment of error urged by appellants and presented on pages 87 et seq. of their printed brief on file, and embraced in paragraph eighth of the motion for rehearing, complaining that the trial court erred, to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in its judgment and decree against them, and in the conclusions of fact and law upon which said judgment was based, in this: That under and by virtue of Section 17 of the act of the legislature of Louisiana of 1878, incorporating the Louisiana Western R. R. Co., the said corporation was and is exempted from legal ability for the alleged injuries resulting in the death of Miller, and such immunity and exemption from liability was a matter of contract between the State of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; and the act of the legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State so as to give, or attempt to give and create, the right of action asserted by plaintiffs in this cause would have the effect, if enforceable of impairing the obligation of said contract, and thus would be violative of the Constitution of the State of Louisiana and of the State of Texas and of the United States of America, and especially of Section 10 of *Act I* of the Constitution of the United States of America.

And in this connection we insist: (1) That Section 17 of
 325 the act of the legislature of Louisiana of 1878, incorporating
 the Louisiana Western Railroad Company, according to
 the testimony in this case, was a valid act of the State of Louisiana,
 and was entitled to full faith and credit by the Courts of Texas, and
 that the failure and refusal to give such faith and credit to said act,
 on the part of the Texas courts, in behalf of appellants, was viola-
 tive of their rights, privileges and immunities, under the Constitu-
 tion and statutes of the United States; and (2) that the legislative
 act of the State of Louisiana of the year 1884, amending Article
 2315 of the Civil Code of that State, if sought to be applied to the
 appellants in this case, would impair the obligation of a contract,
 and would thus violate the State and Federal Constitutions.

Statement.

The defendant, Louisiana Western Railroad Company, plead in
 bar of this action the provision of its incorporating act passed by
 the Louisiana Legislature in the year 1878, exempting it from
 liability to such recoveries and damages as those sought in this case
 (Tr. pp. 19-21), and its co-defendant, Texas & New Orleans Rail-
 road Company, adopted this plea. (Tr. p. 26.)

The testimony of H. P. Dart, of the New Orleans Bar, who quali-
 fied and testified as an expert, by deposition, gave a full history of
 the legislation of Louisiana on this subject, showing that this pro-
 vision of indemnity in the incorporating act had never been abro-
 gated nor held void, within his knowledge, giving his opinion, for
 the reasons therein stated, that it was valid, showing that at the time
 of its enactment it was not prohibited by any provisions of the State
 Constitution, and showing that the legislative act of Louisiana creat-
 ing a right of action for damages to survivors for injuries resulting
 in the death of a relative did not exist at the time of the passage of
 this incorporating act.

Because of the importance which we attach to the testimony of
 this witness, which we conceive to be practically without dispute,
 and because we regard this as a vital point in the case, we
 326 respectfully refer the court in this connection to our state-
 ment made under the eighth assignment of error, on pages
 88-94, inclusive, of appellants' brief in this cause, filed in the Court
 of Civil Appeals, and which, presumably, accompanies this record.

Authorities and Remarks.

We have set forth fully in the statement above referred to the
 testimony of Mr. Dart, as an expert on the laws of the State of
 Louisiana, together with the authorities cited by him in that con-
 nection, showing the history of this incorporating act of the Louis-
 iana Western Railroad Company and the subsequent legislation
 creating the right of action in Louisiana for injuries resulting in
 death; also the opinion of said witness as to the original and con-
 tinuing validity of Section 17 of the incorporating act, with his

reasons and authorities for such opinion; and deem it needless to review his testimony further in this connection.

The history and status of this legislation, as premises in support of our position, may be stated briefly as follows:

At and prior to the time of passing the incorporating act of the Louisiana Western Railroad Company, containing Section 17, the immunity provision in question, there was no provision in the Constitution of Louisiana prohibiting such an act on the ground that it constituted the granting of "special or exclusive rights, privileges or immunities," etc., nor would the provision prohibiting such grants in the Constitution thereof adopted in Louisiana have a retroactive effect, so as to render the immunity provision void, if it was valid at the time of its enactment. (*Pecot v. Police Jury*, 41 La., 707; 6 So. Rep., 677.) The validity of this particular provision (Section 17 of the incorporating act) does not appear to have been before the Louisiana courts for interpretation, though other provisions of the same Constitution giving a special right and privilege, that of expropriation by special methods, was called in question and upheld in the cases of *Louisiana Western Railroad*

Company v. Central & Improvement Company, 119 La., 924, 327 44 So. Rep., 732; and a special right and privilege granted another corporation of Louisiana under the same Constitution, being called in question, was upheld and enforced by the Louisiana courts. (*Gassin v. Williams et al.*, 36 La. An., 187, *St. Julian v. Morgan's La. & Tex., R. R. & S. S. Co.*, 39 La. An., 1063.) So much for the history and status of the immunity provision as revealed by the legislation and court decisions of Louisiana.

At the time of the passage and approval of this incorporating act, March 30th, 1878, there was in Louisiana no right of action for injuries resulting in death, such as that which is sought to be invoked in this case. The Statute on the subject of personal injury, prevailing in Louisiana at that time, was Article 2315, which reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death." (*St. of Facts*, p. 95.)

The law continued in this form until the amendment of 1884, and was in this form substantially when the facts arose which were the subject of litigation in the cause of *Railway Company v. Richards*, 68 Texas, 375, in which our Supreme Court declined to entertain jurisdiction to enforce the Louisiana right of action in the survivors for recovery of the damage which deceased would have been entitled to had he not died, for the reason that no such right of action survived at common law or existed in the State of Texas. The amended act of 1884 by the Louisiana legislature added to the former act above quoted the following language:

"The survivors above mentioned may also recover the damages sus-

tained by them by the death of the parent or child or husband or wife, as the case may be." (St. of Facts, p. 101.)

And the Louisiana court construing this amendment of 328 1884, declared that it created "an obligation by expressly declaring the existence of a liability where there was none before, and opens the way for the recovery for its violation" (*Van Amberg v. R'y Co.*, 37 La. An., 652, *Eichorn v. R. R. Co.*, 112 La., 250, 36 S. R., 335; and had held before the amendment that the former statute limited "the survivors' action to the right of action which the deceased would have had, had he survived the injury" (*Vredenburg v. Behan*, 33 La. An. 643). (St. of Facts, p. 102). Therefore this legislative amendment of 1884, with its construction by the courts, fixes the inception in the State of Louisiana of the right of action and remedy thereunder to the surviving relatives designated for damages to them by reason of injuries resulting in death of their kinsman.

We have plead this immunity provision in bar of the action. Up to the time of the amendment of 1884 there could have been no occasion to make this plea in such a case, for there was no such right of action prior to that time. So that, in so far as the immunity clause exempted defendant from responsibility to the relatives of deceased for damages to them for the injury of the kinsman, resulting in death, it infringed no principles of the then existing law, and extended to defendant no special privilege or immunity under the contemporaneous status of the Louisiana law which was not shared equally by all other corporations and persons within the limits of the State. But the immunity vested in the defendant with reference to injuries resulting in death manifestly implied as to it a perpetual guaranty against the creation or infringement of such a right of action during the continuance of the charter contract. For the period of proximity six years, from 1878 to 1884, this compact on the part of the State of Louisiana unquestionably was kept, for during that period no legislation was enacted rendering it possible to infringe this item of the immunity. Finally, this amendment of 1884 is enacted, upon which the plaintiffs in this case must prevail, if at all. Both of these acts proceeding as they do from co-ordinary authority of the State of Louisiana, the last act should be so interpreted and construed, if practicable, as to 329 avoid conflicting with the former act and repudiation of the State's contract; and the feasibility of such construction is aptly suggested by Mr. Dart in his answer to cross interrogatories of counsel, as follows:

"I should consider the provision of Section 16 of the act of 1878, incorporating the Louisiana Western Railroad Company, valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in law, it would seem reasonable, where the legislature has the right to create a corporation by special act, that it would safeguard the grant or regulate or control rights or privileges under it with the same validity that it could make the original grant." (St. of Facts, p. 93.)

In this connection, and as supporting this interpretation of the amended act of 1884, in its relation to the incorporating act of 1878, we refer briefly to the views expressed by our Texas courts. It is held that a railway charter is a contract between the company and the State, within the meaning of the Constitution, and cannot be affected by subsequent legislation or Constitution. (*H. & T. C. R. R. Co. v. T. & P. Ry. Co.*, 70 Texas, 656.)

"An act of the legislature must be held valid unless some superior law, in express terms, or by necessary implication, forbids." (*Harris County v. Stewart*, 91 Texas, 143; *Whitmore v. Bellnap*, 89 Texas, 273; *Blum v. Nooney*, 69 Texas, 4; *Orr v. Rhine*, 45 Texas, 353.)

"The good or bad policies of the law are legislative questions over which the courts have no jurisdiction." (*U. & C. Insurance Co. v. Chawning*, 86 Texas, 654.)

Therefore, taking the history of this legislation in its entirety, with the constitutional environment, and in the light of the jurisprudence of that State and the decisions of its courts, giving due regard to the fact, as appears, that it has not been the policy to question the validity of this provision in the courts of Louisiana, we submit

330 that the appropriate view for the Texas courts is that the legislature of Louisiana, by the amendment of 1884, creating a new cause of action at law, did not mean to embrace within its terms the defendant Louisiana Western Railroad Company, thus repudiating and impairing the terms of a contract which had been accepted and acted upon by the company for a period of six years.

If, however, the amendment of 1884 is to be interpreted as applying to and embracing the defendant Louisiana Western Railroad Company, notwithstanding the immunity provision theretofore granted, then to such extent we insist the amended act was clearly void and of no effect, in that it infringed and violated the Constitution of the State of Louisiana, and Section Ten, Article 1, of the Constitution of the United States of America, by impairing or seeking to impair the obligation of a contract. Upon this point the only question open for discussion is whether provision 17 of the incorporating act was valid or void at the time of its enactment; for if valid as a proper exercise of legislative power at the time of its passage and approval, the defendant, thereupon having accepted the charter provisions as an entirety, and acted thereunder for a period of six years before this amended act, had acquired vested contract rights which could not be revoked by legislation. In former parts of this argument we have stated sufficiently our reasons, supported by some authorities and by reference to the testimony of Mr. Dart, an expert, for the position asserted that the provision is valid on the face of it, and has not been forbidden by any "other superior law in express terms or by necessary implication." The only point counsel for appellees affirmatively urge against the immunity provision is that such an act would have the effect, pro tanto, of divesting the State of Louisiana of the power, through future legislation, to enact appropriate police regulations, and that the amendment of 1884 creating this right of action was, in its nature and substance, a police regulation, designed to preserve and protect the lives of the people

within the limits of that State, and that the power to enact such legislation was paramount in the State, and could not be divested by legislative contract, and that such contract, if attempted, would be void. We shall not undertake here to discuss the soundness of the principle involved in this contention, as an abstract proposition, or in cases which might properly involve its right application; but we wish to point out briefly the fallacy involved in attempting to apply it here.

Assuming for argument the doctrine to be sound and broad as it is stated above, it is grounded essentially on the police power, and means that the sovereign State cannot be deprived of its inherent power to enact regulations for the protection of life, health and property. Is this amendment giving the right of action for injuries resulting in death within the State of Louisiana a police regulation? If not, the doctrine above stated has no bearing upon it. Let us analyze the amended act as it reads and has been construed, to determine whether its essential purpose is to protect and promote life, or to afford compensation to certain designated individuals in proportion to their damage sustained by reason of the death. If the main purpose revealed is to give compensation to certain private individuals, and it merely happens as a casual incident to such compensation that punishment may result to the wrong doer, this co-incident, we submit, would not give the law the character of a police regulation. The law as it now exists and is invoked in this case reads, with the amendment of 1884 in italics, as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action, shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them for the space of one year from the death. *The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be.* (St. of Facts, p. 101.)

There is no provision by this amended statute for any right of action if there be not left surviving the deceased one or more of the relatives specially designated by the statute; so that if the purpose were a penalty to deter the wrong-doer in the interest of the public, then the act would have this effect only in the case of a person being killed who left one or more of such relatives; and if he did not leave one of such relatives, such person, under the law, could be killed with impunity. This, we suggest, forcefully demonstrates the weakness of the contention that this act was intended by the legislature as an exercise of the police power of the State.

The witness H. P. Dart, in response to cross-interrogatory of plaintiffs' counsel, having reference to the aim of this amended act, says:

"I think the aim of our Louisiana statute is to give pecuniary compensation for the loss sustained. (St. of Facts, p. 105).

According to the testimony of the same witness, and the decisions cited by him, the elements of damage under the Louisiana statute,

as recognized by the courts of that country, are stated as follows: (1) The damages the defendant might have recovered, had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings, during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness, etc.; (2) the loss by deprivation of the decedent's society and his aid and support, also the expense of his death and burial; (3) the recovery for mental suffering of the survivors; (4) vindictive or punitive damages are not permitted in an action for personal injuries against a corporation, etc.

We submit that the elements of damage that are included and allowed in the Louisiana act are strictly compensatory, and the exclusion of punitive damages as an element of recovery under that act is a circumstance forcefully refuting the contention that this act was designated as a police regulation. This immunity provision in

the charter act, we submit, could in no sense or degree have the effect of restricting the State of Louisiana in the enactment and enforcement of adequate penal laws; against reprehensible homicide, and thus leaves intact to future legislatures a full and free exercise of police power for the safety and promotion of human life in that State.

If further argument were required to refute the contention that this amended act of Louisiana was designed to accomplish the essential purpose of police power, we might refer to the interpretation of our Texas statutes by the courts of this State. Indeed, it is not inappropriate that we should consider and adopt the effect of our own statute as a criterion in this connection; for if it be conceded that the essential purpose of our Texas statute is compensation, and not punishment, then, although it be conceded that the essential and only purpose of the Louisiana act was punishment to the wrongdoer under a police regulation, and not compensation then the Louisiana act being so radically different in its purposes from our Texas statute, this conflict in itself would afford an insurmountable obstacle to the enforcement of the Louisiana act in the courts of Texas. (*R'y Co. v. Jackson*, 89 Texas, 107; *De Harn v. R'y Co.*, 86 Texas, 71; *R'y Co. v. McCormick*, 71 Texas 660.) However, in the sense that the statutes of both States contemplated compensation to the surviving relatives mentioned, as their essential object and aim, they are very similar, and we may well resort to the language of the Texas statutes and decisions of our courts construing the same in this connection.

Article 3017, Revised Civil Statutes of Texas, reads:

"An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases," etc.

Article 3021 reads:

"The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased."

Article 3025, Revised Civil Statutes, reads:

"If the sole plaintiff die, pending the suit, and he is the only party entitled to the money recovered, the suit shall abate."

The damages under Article 3017 recoverable, are for actual pecuniary injury, which resulted from the act complained of. (*R'y Co. v. Cowser*, 57 Tex., 293; *R'y Co. v. Kindred*, 57 Texas, 491.)

Damages under this article are awarded strictly as compensation, and not "upon principles of public policy." (*L. & G. N. R. R. Co. v. McDonald*, 75 Texas, 46; *Hays v. R'y Co.*, 46 Texas, 272; *R'y Co. v. Moore*, 69 Texas, 157; *R'y Co. v. Garcia*, 62 Texas, 292.)

For further and full discussion of the distinction between that class of statutes, such as the Texas and Louisiana statutes, which have for their purpose compensation, and that class of statutes which have for their main purpose the punishment of the wrong-doer in the interest of the public, we respectfully refer to the able opinion of the Wisconsin court in the case of *McMillan v. Spider Lake Saw Mill & Lumber Company*, L. R. A., Vol. 60, pp. 589-592.

In disposing of this assignment the Honorable Court of Civil Appeals, in its opinion, used the following language:

"As to the provision in the legislative charter of the Louisiana Western Railway Company, relieving the company from liability for injuries resulting in the death of its train operatives, we will remark that such provision was not, within the purview of Art. 10, Sec. 1, of the Constitution of the United States, such a contract between the railroad company and the State of Louisiana as the State was inhibited from impairing an obligation. As before intimated, the power of the State to exercise its general legislative functions could not be traded or bartered away in any such manner.

335 * * * It is not left to conjecture what the ruling of the Supreme Court of the United States would be, if a case arising under the employers' liability act should come before it involving the question of immunity from liability claimed here by the defendant under its charter. That great and pure tribunal, with one breath, would blow it away, as though it were but thistle down; and yet an act of congress can no more impair the obligation of a contract than can the act of a State legislature."

We suggest that the learned court, in predicting the view that the United States Supreme Court would take of this provision, if coming in conflict with the employers' liability act, overlooks the essential fact that the employers' liability act passed by Congress is based upon the reserve power of the Federal Government to regulate interstate commerce independently of and beyond the control of the State. Hence it doubtless would be properly held that this provision in the act of incorporation at the time of its enactment could not extend to the protection of a local corporation with reference to those matters in which it might in the future become involved in the conduct or course of interstate commerce. But the present controversy involves no such question. It relates merely to local occurrences in the State of Louisiana of that class over which the legislature of Louisiana had full control, under the powers of its State Constitution, and, which State Constitution, by the way, under the undisputed evidence in

this case, in no wise prohibited the granting of such privileges and immunities as that provided for in Section 17.

Again, the Honorable Court of Civil Appeals, in this connection, emphasized its view that the amended act of 1884 of the State of Louisiana, creating for the first time the cause of action here asserted, was a species of police regulation, enacted under the police power which the former legislatures of Louisiana could not contract away. The evidence in this record above mentioned giving the history and the object of this act of Louisiana, we submit clearly
 336 demonstrates that its purpose was mere compensation to certain designated relatives in proportion to the damage sustained by them; and indeed, if the object of the amended act of 1884 of the State of Louisiana was in any sense penal in its nature, it would not be transitory, and could not be enforced beyond the jurisdiction of the State of Louisiana. As authority for this proposition, it would be sufficient to read that passage of Wharton on Conflict of Laws (3rd Ed.) Section 480*a*, which is quoted with approval by the Honorable Court of Civil Appeals, on page 4 of its opinion in this cause. See also the following authorities: *Boston & Maine R. R. Co. v. Hurd*, 46 L. R. A., 209, with note citing *Higgins v. Central N. E. & W. R'y Co.*, 155 Mass., 176; 29 N. E., 534; *Nelson v. Chesapeake & Ohio R. R. Co.*, 88 Va., 971; 15 L. R. A., 583.

Seventh Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the ninth assignment of error urged by appellants and presented on pages 104 and 105 of their brief on file, and embraced in paragraph ninth of the motion for rehearing, complaining that the trial court erred, to the prejudice of each of the defendants, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in its judgment and decree against them, and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston, in said Harris County, Texas, to Lafayette, in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employes of the other, as the business or convenience required, and each hired for and discharged employes in the said joint business, and the employes hired by one were required to perform, and did perform, services on the railway of the other; that such employes made continuous runs on trains operated from Houston to Lafayette, and *vice versa*, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston
 337 and Lafayette over said railways, as a continuous route, and were partners in such business, sharing in the profits and losses thereof."

And the court erred in concluding, as matter of law, that the Texas & New Orleans Railroad Company was jointly liable with the

Louisiana Western Railroad Company for the injury and death of the said William Miller, and in rendering joint and several judgment against the two defendants accordingly.

Statement.

The conclusions of fact and law complained of were in the language as above quoted. (Tr. pp. 40 and 41.)

These conclusions of fact and law, and each of them, were duly excepted to by defendants in open court, and such exceptions are duly entered as part of the record in this cause. (Tr. pp. 38 and 39. See also bill of exception No. 7, Tr., p. 99.)

We insist that the conclusions of fact and law here announced by the trial judge and made the basis of his findings and of his judgment, holding the two defendants virtually as partners, and awarding a joint and several judgment against them, was not justified by, nor the logical effect of, the testimony, and that the Honorable Court of Civil Appeals erred in adopting the same, and the findings of fact as thus made in this connection and set forth in the opinion of the court are misleading and unfair.

We have made full statement, with accurate extracts from the testimony, on this feature of the case, under the head of statement, on pages 106-122 of the appellants' brief in this case, filed in the Court of Civil Appeals, which we assume accompanies the record before this Honorable Court, and we refer to that statement in this connection for the undisputed facts refuting the conclusion of partnership or other relation between the defendants, such as to justify the judgment against the Texas & New Orleans Railroad Company.

Authorities and Remarks.

In the light of the evidence quoted in the statement above mentioned (on pages 106-122 of appellants' brief on file), and
338 without review of it here, we submit that it does not disclose any such community of interest or division of losses or profits, or joint or mutual agency, as to create a partnership between the two railroad companies, in law, and render them jointly and severally liable on such theory for the negligence of either of them on its respective line, according to the tests of a partnership relation. Indeed, we contend that the evidence, without dispute, practically contradicts the conclusions of fact on the point of division of profits and losses. (See testimony of G. R. Cottingham, St. of Facts, p. 77.)

As illustrating our view of the effect in law of the methods of employment and payment and service of the train crews and other employés who worked, alternately, for one or the other of the defendants on the through passenger run, and the use of the same locomotives and cars on the through run, and the repair thereof, each company accounting and paying for the use and repair of same, according to the mileage and service on its respective line, and the

fact of having some common officials between them, we refer to the opinion of the Supreme Court of the United States in the case of *Peterson v. Chicago, Rock Island & Pacific Railroad Company*, 205 U. S., 51 L. Ed., 851.

In that case the direct question of partnership, it is true, was not involved; nevertheless, the facts of that case in some respects present a status similar to the instant case; and the expressions of the learned court upon the facts in their relation to the matter of service involved, are illustrative, and tend to support our contention that, under the undisputed facts of the instant case, there can be no joint and several liability on the theory of partnership, or joint and mutual agency.

Eighth Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the tenth assignment of error urged by appellants, and presented on page 127 of their brief on file, and embraced in paragraph tenth of the motion for re-
339 hearing, complaining that the trial court erred in its judgment and decree, and in that portion of its conclusions of

fact and law, being paragraph No. 2, to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employes operating the trains relied upon the defendant companies to keep the said gates closed, so as not to expose them to peril of injury or death by derailment, and that the failure of the defendants to keep such gates closed was negligence on their part proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that, according to the facts of the case, and under the law applicable thereto, the said gates had been placed in the right-of-way fence for the use and benefit of third parties, and the Louisiana Western Railroad Company imposed the duty on said third parties to keep such gates closed, and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of the defendants, or either of them, rendering them liable for the alleged negligence and death.

Statement.

The gates were placed in the right-of-way fence of the defendant Louisiana Western Railway Company for the use of the adjacent land-owners and their tenants on the opposite sides of the railroad, and these gates were really of no service to the defendant, nor were they used by it. Reasonably effective appliances were provided for fastening these gates, and the defendant caused a printed notice to be posted on the gate, reading as follows:

"Notice.

"These gates and the crossing are for the exclusive use of the owners and occupants of the adjoining land. Such owners and occu-

pants are hereby notified and warned to see that the gates are kept closed. The railroad company will not assume any responsibility for stock killed or other damage done by reason of these gates being left open.

340 (Signed) MORGAN'S LOUISIANA & TEXAS
RAILROAD & STEAMSHIP CO.,
LOUISIANA WESTERN RAILROAD
CO.,

"By W. F. OWEN, *Superintendent.*"

(St. of Facts, p. 31.)

As matter of fact, persons passing through and using these gates would frequently leave them unfastened and open, and thus allow live stock to get in upon the right-of-way and track, and the train crews generally knew that these gates were put in for the benefit of adjacent land owners, and that the latter were required to keep them fastened. (See Statement of Facts, testimony of J. A. Sobar, pp. 25, 26, 29; Map, p. 30; Notice, p. 31; testimony of Reese, pp. 6 and 7; Mallory, p. 32; E. E. Chackford, p. 39; Hildebrand, pp. 49 and 50; Bustin, p. 54; Lawlor, p. 61; Davis, p. 62; Stock Reports, pp. 63, 64 and 65.)

Authorities and Remarks.

According to the laws of the State of Texas, the failure of the company to keep the gates closed at this crossing, having first provided proper fastenings, for the use of third parties, constituted no actionable negligence on its part.

R'y Co. v. Glenn, 8 Tex. Civ. App., 303; 30 S. W., 845.

R'y Co. v. Robinson, 17 T. C. A., 401; 43 S. W., 70.

R'y Co. v. Adams, 24 T. C. A., 236; 58 S. W., 1035.

There was no statutory law nor decision in the State of Louisiana requiring the fencing of this track, or holding that the failure to fence by the railroad was negligence on its part.

The witness Dart, as an expert on the Louisiana law, testified in this connection as follows:

"There was no statute in Louisiana on the subject of fencing railroads, at the time of the injury complained of in this suit, or subsequently. I know of no decisions of the courts of Louisiana requiring railroad companies having and operating railroads in this State to fence the railroads or tracks.

341 "I am not aware of any case decided by our Supreme Court of Louisiana holding that the failure to fence a railroad might be taken into account by a jury in determining the question of negligence of the railroad company for injury to a passenger or employé by derailment of an engine or train." (See bill of exception, Tr., p. 62; St. of Facts, p. 92.)

Ninth Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the eleventh assignment of error urged by appellant, and presented on pages 130 and 131 of their brief on file, and embraced in paragraph eleventh of the motion for rehearing, complaining that the trial court erred, to the prejudice of each of the defendants, and in its judgment against them and in its conclusions of fact and law upon which its judgment is based, and especially in that portion of its conclusions, being paragraph numbered 4, reading as follows, to-wit:

"I find that some hours previous to the derailment of Miller's locomotive, another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right-of-way, within a short distance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employes of defendants, in charge of one of the defendants' eastbound trains, gathered about the dead one, holding a 'ceremony', as expressed by one of the witnesses; that the said cattle were probably attracted upon the right-of-way by the dead one; and I find that defendant knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open, cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time

342 to have notified Miller of that fact, and in time to have had the said cattle removed from the right-of-way, and I find that it was the duty of defendants and the section upon which the said cattle were, to have removed said cattle, or failing so to do, that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right-of-way, and that they could have notified him, and in that case he could have been on the lookout for said cattle, and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the said Miller notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Miller, and that plaintiffs were actually damaged by his death in the sum hereafter stated."

And the court erred in this connection in concluding, as matter of law, that the facts so found, as above quoted, constituted actionable negligence on the part of the defendants, or either of them, and in accordingly rendering judgment against them on such grounds, for the following reasons, to wit: (1) that there was no pleading in the plaintiffs' petition charging actionable negligence on the part of the defendants, or either of them, in leaving the dead

animal near the track, whereby other live animals were attracted onto the right-of-way, and thereby the latter became an obstruction causing the wreck, the allegation of the petition, on the contrary, being that the dead or wounded animal itself got upon or was left upon or near the track, and itself became an obstruction causing the wreck, and there being no evidence to support this latter allegation, as actually made in the pleading; (2), that, under the undisputed facts in the case, there was no testimony or circumstance of probative force amounting to any evidence that the animal which was encountered and caused the wreck and death of William Miller, was one

of those animals actually observed inside the right-of-way
343 fence, and near the track, by the fireman, when he was passing the point of the wreck seven or eight hours prior to its occurrence; and hence the necessary causal relation between the failure to remove the cattle seen by Reese, or notify Miller of their presence at this point, and the wreck itself, is not established by any evidence in the record so as to support and sustain the judgment rendered.

And in this connection we especially urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the fourth paragraph thereof, to the effect that the defendants were guilty of negligence in failing to remove, from the right-of-way enclosure the cattle which were observed by their employé Reese, inside of the fence, or to notify the deceased of the presence, it was necessary to show by some legal evidence the identity of the animal thereafter encountered by Miller's locomotive, as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there was no causal relation shown in the record between the negligence found by the court, in his conclusions, and the injury complained of, to support the judgment.

Statement.

With the firm conviction that the holding of the Trial Judge and the conclusion of the Honorable Court of Civil Appeals is without any legal evidence in the record to sustain the necessary causal relation between the negligence as found, and the injury complained of, we respectfully ask that this court will indulge us in submitting here at some length, and in detail and literally the testimony in this connection, for this is the only method known to us by which this court can pass upon the question of law, whether there is any evidence to show the causal relation vital to the case.

The only testimony that the animals were inside the right-of-way fence at or near the track at the point of the derailment, and prior to the time thereof, or that any employé of defendant saw
344 them there, was that of the plaintiffs' witness Reese, who testified that he was a fireman on a locomotive drawing a passenger train and going west, passing this point about 4:45 o'clock P. M., and that he saw one dead animal lying near the track, and four or five live cattle inside the right-of-way fence, looking

at this dead one, and apparently holding a "ceremony" over him. (St. of Facts, pp. 2, 3, 6 and 7.)

We quote from the testimony of Reese, in this connection, as follows:

"I was fireman drawing the regular passenger train known as "Second No. 5," running from the direction of New Orleans to Houston, and my train passed Sulphur Mine somewhere in the evening, during daylight. Sulphur Mine is a station on the Louisiana Western Railroad, located in the State of Louisiana, about ten or fifteen miles west of Lake Charles, and about twenty-seven miles east of Echo. Echo is located in Texas, on the west side of the Sabine River. The train that I was on upon this occasion got into Echo very late in the evening; the train that Mr. Miller was on, going east, passed Echo somewhere about 11 o'clock at night. (St. of Facts, p. 1.)

"I am familiar with the point at which this wreck occurred—about three miles west of Sulphur Mine. The right-of-way is inclosed with a fence along by that point. On the evening before this wreck, when I passed this point, I saw cattle within the right-of-way fence at this point, and I saw a gate open, leading into the right-of-way at this point, as I passed on my engine. The cattle which I saw on this occasion were about 150 or 200 feet east of this gate. I saw four or five cattle in there, though I don't know exactly how many. * * *

"When I passed on this evening, I saw one dead animal at this point, which looked like it had been killed. This dead cow was lying right close to the track, and the other cattle which were alive seemed to be holding a kind of ceremony over the one that was dead there. I did not see any other cattle lying down next to the track or close to the track beside the dead one. There were none of the cattle close around where the dead cow was that appeared to be crippled; their physical condition was perfect, so far as I know, excepting the one that was killed. The one that was killed was very close—three or four feet—from the end of the ties, I suppose. I saw it as my train passed by, and I could tell from looking at it that it was dead. It had not been dead long, though I did not feel of it, and could not tell whether it was warm or cold, and, as matter of fact, could not say definitely how long that cow had been dead, but these other cattle were around there, standing off looking at it.

"When we got into Echo that night I did not, nor did my engineer, nor did anybody connected with my train, so far as I know, report the dead cow lying near the track near Sulphur Mine, nor other cattle being on the right-of-way. My regular engineer at that time was Lon Wilson, but he was not running the engine that evening. A man by name of Clark, who is supposed to be the traveling engineer, was in the engine with me, and running it, when we passed the point of the wreck. (St. of Facts, p. 2). * * *

"I told him (Clark) that cattle were on the right-of-way. He said nothing to amount to anything; I don't know that he said anything at all. I told him there was a dead cow lying down there;

the cow had indications of having been struck by an engine, and apparently that is the way she had been killed. (St. of Facts, p. 3).

* * *

"Mr. Miller was the engineer in charge of the east-bound passenger train on that date, and I believe we met him that night at Amelia. The train he took out was known as the 7:20 train, No. 8. He was pulling No. 8, which left the City of Houston at 7:20 p. m. Amelia is five miles west of Beaumont. (St. of Facts pp. 3 and 4).

* * *

"The train being drawn by Miller's locomotive was due at Sulphur Mine somewhere around 12 o'clock at night, and I had passed Sulphur Mine somewhere about between 5 and 6 in the evening, while it was still daylight. (St. of Facts, p. 4.)

347

"When I passed by the point at which the wreck afterwards occurred, I saw one head of stock dead, and the others seemed to be looking at it. I am familiar with the private crossings equipped with gates on the road in Louisiana." (St. of Facts, p. 6.)

The train drawn by Miller, going eastward, reached the point of derailment, and the derailment occurred sometime between 11:25 and 12 o'clock at night. (See St. of Facts, pp. 47 and 48; testimony of Kimmer, St. of Facts, p. 51.)

W. H. Kimmer, a locomotive engineer operating a freight train on the Louisiana Western Railroad, testified as follows:

"On that date I left Lake Charles, going westward, to Echo. We got to Echo about 12 o'clock that night, June 1st, 1905; we passed the station of Sulphur Mine four times on that date; that is, making two round trips, passing Sulphur Mine on that day. On the first trip I passed Sulphur Mine and went to Echo, and then left Echo and went back to Lake Charles; and then I left Lake Charles at night, going back to Echo, and passed Sulphur Mine at 11:07 p. m. Sulphur Mine is about two miles or a little over east of where the wreck occurred. I reached Sulphur Mine at 11:07 p. m., and continued on west towards Echo. It was west of Sulphur Mine where the derailment occurred, and the next station was Edgerly, and in going from Sulphur Mine to Edgerly we passed over the point at which the wreck afterwards occurred. We met the passenger train that was being drawn eastward by Miller and Gross at Edgerly; we reached Edgerly and passed the east-bound passenger train there about 11:35 p. m. When we passed the point between Sulphur Mine and Edgerly, at which the wreck afterwards occurred, and which place I am familiar with, my engine did not encounter any obstructions on the track, nor did I observe any stock there at that place, or about there. When I arrived at Vinton, after having met the passenger train at Edgerly, we were asked by the operator at Vinton, which was a night office then, if we delayed or stopped No. 8 at Edgerly, as she had not shown up at Sulphur Mine, which was another night office, and we told the operator that we did not,

347

and on our arrival at Echo we heard of the wreck having occurred between Edgerly and Sulphur Mine, so that No. 8, the passenger train on which Miller and Gross were engineer and firemen, thus had not reached Sulphur Mine, and this was the cause

of the inquiry made of us by the operator at Vinton." (St. of Facts, p. 51.)

Hildebrand, a locomotive engineer in the employment of the Louisiana Western Railroad Company at the time of this accident, testified: That he remembered the occurrence of the derailment near Sulphur Mine on June 1st, 1905, in which Miller and Gross were killed, and that he made a trip between Lafayette and Echo, as an engineer on a freight train upon that date. He said:

"I came from Lafayette to Echo on that date; I passed the scene of the wreck—where it afterwards occurred—about 8:30 p. m.; it was dark when I passed there! I know where the derailment occurred; I judge this place was about two and a half miles west of Sulphur Mine. In passing the point where the wreck afterwards occurred I did not encounter any stock, nor observe any, so far as I can remember. I heard of the wreck that night, and after I had passed that point, if I had struck any stock there I would have known it; I did not strike any, nor observe any, that I remember. The train that my engine was drawing was a freight train that ended its run at Echo. It was operated over what was called the Louisiana Western Railroad. The superintendent of the road over which I operated, and to whom I reported, was Mr. Shackford. * * * I got to Echo on this trip at 9:30 p. m. I did not meet or pass the train that engineer Miller was operating; I arrived at Echo before he did." (St. of Facts, p. 49).

L. Lawlor, who was roadmaster of the Louisiana Western Railroad Company, testified:

"My division as roadmaster embraced the railroad between Lafayette, Louisiana, and Echo. My duties as roadmaster were to look after the repairs of the track, keep up the track and fence, and everything else connected with the railroad. * * *

"I remember the occurrence of the wreck and derailment of a passenger train near Sulphur Mine on the 1st of June, 1905, 318 in which Miller and Gross, the engineer and fireman, were killed, and I know and am familiar with the point at which this wreck occurred, and know of the condition of the road and track there and in that vicinity at the time of the derailment, and prior thereto. * * * On the day of the derailment, and previous thereto, I was upon train No. 60, a local freight, sprinkling the track with fuel oil, between Echo and Lake Charles, and passed over the point at which the derailment afterwards occurred. I passed along over this point about half past five p. m. The wreck afterwards occurred at that point about midnight. I was there after the wreck occurred. I went there to clear the wreck up that night after its occurrence. When I passed along there on the local train about half past five that evening before the derailment, I observed no stock within the right-of-way fences at or in that vicinity. I would have been very apt to have noticed any stock if they had been there at that time, because I was standing on the top of an oil car attending to the valves and was sprinkling the track with oil to kill the grass on the track. From that point the train that I was on went to Lake Charles." (St. of Facts, p. 59.)

G. E. Bustin, who was section foreman, and had in charge the portion of the road upon which this derailment occurred, testified that he passed along over this track on June 1st, 1905, going out over it to the west in the morning and returning in the evening. He testified further:

"On this occasion I found the gates open during that day some time; I don't remember what time of day, but I shut the gate that day. There was only — of the gates that I found open. At that time I found no cattle in there whatsoever. I can't remember what time of day it was that I found this gate open and shut it; I know I shut and closed the gate that day; my report shows I did, and I know I did it that day, but I don't remember whether it was in the morning or evening that I shut it, but my report showed that I shut it on that day. I went home from work that evening somewhere about 6 o'clock; I got into Sulphur Mine probably a
349 few minutes later than 6; I had my section crew with me."
(St. of Facts, p. 54.)

Train Sheet Showing Passage of Trains by Point of Accident from Time Reese Observed Cattle until Time of Derailment.

In connection with the testimony of the witness Shackford, who, was Superintendent of the Louisiana Western Railroad Company, and in whose office and under whose supervision the train sheet was kept, and who identified and vouched for its accuracy, this train sheet was introduced in evidence by defendants, and its full effect on the points here involved is set forth on pages 46, 47 and 48, statement of facts, as follows, to wit:

"The train sheet here introduced in evidence consisted of a tabulated statement in the original hand-writing of the train dispatchers on duty, covering the train operations and movements on the railroad extending between Lafayette and Echo, during the twenty-four hours of June 1st, 1905, beginning 12:01 a. m. of that date and closing with 12:01 a. m. June 2nd, 1905. This train sheet contains a printed list, beginning with Lafayette and showing in their order the several stations between that point and Echo, and showing the distances between these respective stations, as follows:

"Lafayette, 5:14 miles to Scott; 10:36 miles to Rayne; 6:35 miles to Crowley; 6 miles to Easterwood; 2 miles to Midland; 5.49 to Mermontau; 4.94 miles to Jennings; 5:63 miles to Roanoke; 5.08 to Welsh; 10.47 to Iowa; 11:35 to Lake Charles; 2:32 miles to West Lake; 7.73 miles to Sulphur Mine; 7.73 miles to Edgerly; 5.41 miles to Vinton; 5 miles to Tuney; 4:76 miles to Echo.

"This train sheet shows that during the twenty-four hours of June 1st, 1905, there were operated over the line of road extending between Echo and Lafayette and passing the point of the wreck, twelve regular and extra trains going west, and fourteen regular and extra trains, including the wrecked train, going east.

"This train sheet further shows by its tabulated entries,
350 the following train movements:

"That first section No. 5 (a passenger train, drawn by

engine 257, Dobbins, engineer, a west-bound), left Lafayette at 1:18 p. m., June 1st, 1905, passing Sulphur Mine Station at 4:25 p. m., passing Edgerly at 4:39 p. m., and reaching Echo at 5:15 p. m., June 1st, 1905.

"That second section No. 5 (passenger train, drawn by engine 251, with Wilson as engineer on which the witness Reese was fireman—going west), left Lafayette at 1:28 p. m., June 1st, passing Sulphur Mine at 4:39 p. m., passing Edgerly at 4:49 p. m., and reached Echo at 5:20 p. m., June 1st, 1905.

"That train No. 245, drawn by Engine 194, with Hildebrand, engineer, a freight train, going west, left Lafayette at 1:45 p. m., June 1st, passing Sulphur Mine at 8:15 p. m., passing Vinton at 8:55 p. m., and reached Echo at 9:30 p. m.

"That extra freight train drawn by engine 213, with the witness Kimmier, engineer, going west, left Lake Charles at 10:30 p. m., June 1st, 1905, passing Sulphur Mine at 11:07 p. m., reaching Vinton at 11:53 p. m., leaving Vinton at 11:56 p. m., and reaching Echo at 12:15 a. m., June 2d, 1905.

"That local freight train No. 60 drawn by engine 173, going east, left Edgerly at 4:29 p. m., June 1st, 1905, reached Sulphur Mine at 6:50 p. m., left Sulphur Mine 7:12 p. m., and reached Lake Charles at 8:35 p. m.

"That passenger train No. 8, drawn by Engine 250, with engineer Miller (deceased) in charge, going east, left Echo at 11:02 p. m., June 1st, 1905, left Vinton at 11:23 p. m., met and passed west-bound extra freight drawn by Engineer Kimmier, at Edgerly (time not noted on train sheet, but, according to testimony of Engineer Kimmier, about 11:35 p. m.), and No. 8 then disappears from the train sheet before reaching Sulphur Mine, with the following memorandum noted on train sheet: 'Wrecked $1\frac{1}{4}$ miles west of Brimstone'. Brimstone is shown (on the map of the L. W. Railroad, attached to the printed time cars introduced) to be situated between Edgerly and Sulphur Mine, close to the latter place, but the place referred to as Brimstone in this memorandum is not indicated in the list of regular stations on the time card or train sheet". (St. of Facts, pp. 46, 47, 48).

Only one animal was killed in the wreck, the other dead one found there having been killed some time before, and doubtless being the same that was observed by Reese, and there was no evidence of identity between the animal causing the derailment and any of those observed by Reese, as disclosed by those observing them after the wreck. (See testimony of Long, St. of Facts, pp. 10 and 11; Bustin, pp. 54, 56 & 57.)

J. P. Long, a witness for the plaintiffs, testified that he was a passenger on the train which was derailed near Sulphur Mine June 1st, 1905; that he was in the rear sleeper at the time of the derailment; he got up and went forward, looked at his watch and found it was 11:45 p. m., that he walked ahead through the sleepers and got out on the south side of the train; that afterwards he crossed over on the north side, and when he got up about half-way between the front of the rear end of the second coach and was crawling on

his hands and knees he put his hands on a warm animal that was lying on the track directly under the coach. In this connection he said:

"It was dead, and had been dragged some distance from the west, going east, and it was lying then north, on top of what was the original road-bed; it was warm, and was a large animal. I was there where the animal had been dragged on the gravel, where the animal had been dragged in some manner under the engine and coaches. * * *

"We stayed there at the wreck until about daylight. The relief train came in a little before we left, and I understand it took these men away.

"I did afterwards observe another animal there in the vicinity of the wreck besides the large one I heretofore mentioned. After the engineer and fireman were placed on the train I crossed
352 over on the south side and walked west. I crossed over on the platform of the passenger coach, to the south side, and walked west, and when I got about 100 feet, or probably 125 feet, from where this animal (the first animal) was lying, and partly under the coach on the south side of the track, I found a large yearling that was badly bloated and cold, lying some seven or eight or ten feet from the track on the south side, and it had been dead apparently thirty-six to forty-eight hours; it was bloated, and was probably ten or twelve feet, or a little more, from the south side of the track. There was no wreckage about it. It had been struck by a west-bound train, and I say it had been struck by a west-bound train from the posture the animal was lying in, and also the ground showed it had been that way. This yearling was somewhere about on the south side of the track where the rear end of the rear sleeper, or the last car of the train, stood. The cars that were by the yearling were still on the track; all the coaches, both sleepers, the first-class and a part of the second-class coach, were on their tracks; they were on the rails; the head coach was not on the rails, but the second coach from it was on the rails, I think the rear trucks, and the other cars were all on the track, including the two sleepers. I suppose it was a distance of 200 or 250 feet from the location of this yearling up eastward to the wreckage. There was no indication that any portion of this train had come in contact with the yearling; it could not have been so; the yearling was lying down about fifteen feet from the end of the ties on the south side of the track." (St. of Facts, pp. 10 and 11).

G. E. Bustin, the section foreman, testified with reference to the dead animals, as follows:

"There was only one head of cattle, that had been killed that night. It was a big bull, I think, and was red; I never saw this animal before that derailment; that was the first time he had ever been on that right of way, so far as I know. I did not see any other cattle in there that night or the next morning; I did not get any cattle out
353 of there on that day after the wreck; I looked to see if there were any cattle within the right-of-way the next morning after the wreck, and did not find any, and this one that

was killed was the only one on the inside at that time. I did see another dead animal in there the next morning; there was a dead yearling that was killed the second day before this occurrence, right at the same place; it came through this gate. The people had a practice of leaving gates open in going through there, and I had to shut it every day. This other animal that was killed was a yearling, and had been there from the second day before this wreck happened; it was right even with the gates; right at the crossing. I think it was; I suppose about fifty yards west of the crossing where this yearling was killed. This yearling was lying on the south side of the track, down in the dump, on the west side from the crossing, about fifty feet west of the crossing on the south side of the track; that was not the side that the bull was on; the bull was on the east side of the crossing, and it was on the north side of the track when I got there; it had been dragged out from under the trucks. The bull and the yearling were on opposite sides of the crossing. I guess they were about 100 yards apart. I had never seen either of these animals in there before, that I know of; I cannot say that I had seen these same ones." (St. of Facts, pp. 56 and 57).

Authorities and Remarks.

The theory of actionable negligence on the part of the defendants found by the court as conclusions of fact, upon which he bases the judgment, is that (1) the defendant knew the cattle had entered through an open gate into the enclosure of the right-of-way, and upon or near the track; (2) that the defendant owed the duty to remove the cattle, or to notify Miller of their presence within the enclosure, and the failure to do so was negligence; and (3) that the failure to remove the cattle observed by Reese within the enclosure, or to notify Miller of their presence therein, was the proximate cause of the derailment, and without which it would not have occurred.

354 We contend that a searching analysis of the entire evidence will demonstrate an utter failure to establish any causal relation between the omissions of duty found by the court and the derailment of Miller's engine. The only witness whose testimony could possibly afford any support to the court's conclusion that some hours before the derailment a number of cattle were seen by members of a train going east inside the right-of-way fence, and that defendant knew this fact, or could have known it by ordinary care, was the fireman Reese, who testified in substance, that when passing this point in the afternoon, as the train-sheet shows, between 4:39 p. m., and 4:49 P. M., he saw one dead animal lying near the track and south of it, and four or five live cattle inside the right-of-way fence looking at this dead one, and apparently holding a "ceremony" over him. (St. of Facts, pp. 2, 3, 6 and 7). There is absolutely no evidence that the defendant actually knew this fact, unless it be said that the observation of Reese himself and his companion, Clark, were such knowledge of defendant. Let this be assumed and conceded, for argument's sake, that the knowledge and observation of Reese, as related in his own language, were

chargeable to defendant. Thus we have the fact, within defendant's knowledge, that when Reese passed this point about 4:45 p. m., as shown by the train sheet, there was one dead animal lying south of the track previously killed at some uncertain time, and there were four or five other cattle, with no special description to identify them, standing inside the right-of-way fence near the dead animal, and in the vicinity of the derailment. The train that Reese was firing on, as shown by the train sheet, passed Sulphur Mine, a station two and one-half or three miles east of the point of derailment, at 4:39 p. m., and passed Edgerly, a station a short distance west of this point, at 4:49 p. m. The train drawn by Miller and derailed, going east, passed Vinton, a station west of the point of accident, at 11:23 p. m., as shown by the train sheet, and met engineer Kimmer at Edgerly, 5:41 miles further east, and was derailed before

reaching Sulphur Mine, the derailment occurring, according 355 to the testimony of plaintiffs' witness, J. P. Long, who looked at his watch at the time, at 11:45 p. m. (St. of Facts, pp. 10 and 11.) Thus, about seven hours had elapsed from the time that Reese saw the cattle in the daylight until the derailment occurred during the night by reason of collision with a large animal of the cow species, described by one of the witnesses as having the appearance of a big bull. (St. of Facts, pp. 10 and 11). We submit that the mere co-incident of Reese having seen the four or five live cattle and a dead one within the right-of-way fence in the day time at 4:45 p. m., and that the train drawn by Miller, going eastward, struck in the vicinity of this point a large animal at 11:45 p. m., seven hours afterwards, standing alone and in itself, would have no probative force even tending to sustain a finding that the failure to drive out the cattle observed by Reese and close the gate, or notify Miller was a proximate cause of the derailment, and without which it would not have occurred. This coincidence would necessarily require some further evidence, some circumstance of probative force, at least, going to identify the animal killed as one of those observed by Reese. But the various circumstances and environments of this occurrence, instead of making it probable that this was one of the animals observed by Reese, and that it had remained at this point from the time he passed up to the time of the derailment, tend rather to the contrary and neutralize any significance that might be attached to the fact of striking the animal where Reese, seven hours before, had observed four or five head of cattle.

There was absolutely nothing to identify the animal struck as one of those observed by Reese in even the circumstance of number; for this was the only animal struck on that occasion by Miller's engine, and none other, living or dead were observed either that night or the next morning within the enclosure, except a dead and bloated yearling located about one hundred yards west of the wreck, which had been killed two days before. So that if the large animal causing the wreck had been one of those cattle observed by Reese, it had been separated from its herd during the seven 356 hours that had elapsed before the derailment. During this period of seven hours from the time that Reese saw the cattle

up to the time of derailment, several of those who have testified as witnesses in this case passed the point and did not observe the presence of any cattle, although they had the opportunity to do so if those cattle had been or remained there. The section foreman, Bustin, went by this point going west, to his work in the morning, and repassed again in the afternoon about 6 o'clock, going home. From his memorandum book he found that he had closed one of these gates, either going out or returning on that date, but at that time he saw no stock within the enclosure. (St. of Facts, pp. 56 and 57). Three trains also passed this point during the seven-hour period, without either observing or encountering any cattle in this vicinity. The roadmaster, L. Lawlor, was on top of a car, sprinkling the road-bed and track with oil, and was in position to observe stock if they had been within the enclosure when he passed. According to his testimony, he passed this point about 5:30 p. m. The train sheet indicated that the train which Lawlor was on, a local freight, passed Sulphur Mine, going east, at 6:50 p. m., having passed the point of the accident after the time when the cattle were observed by Reese (St. of Facts, p. 59). Hildebrand, the engineer on train No. 245, going west, passed Sulphur Mine at 8:15 p. m., and Vinton at 8:55 p. m., according to the train sheet, thus passing the intermediate point at which derailment occurred between these times, and neither did he encounter nor observe any stock within this vicinity on the right-of-way. (St. of Facts, p. 49) And finally, Kimmer, engineer on 213, drawing an extra freight train, going west, is shown by train sheet to have passed Sulphur Mine at 11:07 p. m., and Vinton at 11:53 P. M., having passed the point of derailment between these times, and he met and passed the train drawn by Miller at Edgerly, and thus a few minutes after Kimmer had passed over the point of derailment, without observing or striking any stock, Miller's engine, going eastward, struck the large animal and was derailed at 11:45 p. m. (St. of Facts, pp. 46-48).

357 In view of the facts and circumstances above recalled, and considering the probability that, whether these cattle had been removed by defendants' employe and the gates closed or not, third parties passing through the gates and crossing the track were likely to have left the gates unfastened, and thus allowed stock to get in at any time during the lapse of the seven hour period, we submit that there is no testimony or circumstance of any probative force amounting to legal evidence of identity between the animal causing the derailment and any of those animals observed by the witness Reese (Lee v. R'y Co., 89 Texas, 583; Choate v. R'y Co., 90 Texas, 88); and we insist that no inference can be reached upon the record in this case, that the failure to report what Reese observed, or to remove the cattle seen by him, was a proximate cause of the derailment, and without which it would not have occurred—except by "basing one inference on another, which the law will not permit." (R'y Co. v. Porter, 73 Texas, 306).

Summary.

The material facts in the record bearing on this vital point of causal relation and their logical effect in this case, as we conceive it, may be summarized as follows:

The witness Reese, the only person who saw any animals on the track at the point of the accident on that date, passed that point between the hours of 4:39 p. m. and 4:45 p. m., and on passing saw one dead animal south of the track, and four or five others inside of the right-of-way fence around the dead one, without being able or undertaking to give any special description of these live cattle; that the train with which Miller and Gross were engineer and fireman reached the point of the accident, going in the opposite direction from that of Reese, at 11:45 p. m., encountering one large animal (said by those who observed it after it was killed to have been a big bull), causing derailment, and at the time of the accident no other cattle were encountered or observed at this point. Between the time when Reese had observed the several animals at this point, and the time when Miller's locomotive encountered the one animal at

that point there had been a lapse of about seven hours. In the
 358 meantime, the section foreman Bustin, at 6 p. m., the road-master Lawlor, at 6:50 p. m., the engineer Hildebrand at 8:15 p. m., and the engineer Kimmer at 11:07 p. m. had passed the point of the accident and observed no cattle on or near the track or within the right-of-way fence at this point; and the evidence showed without dispute that people residing on either side of the railroad in the vicinity of this point made a practice, night and day, of passing through the right-of-way gates, frequently leaving them open on such occasions, so that cattle indiscriminately would have access to the right-of-way and road-bed, and would enter upon it. Thus we insist, in the light of the record and undisputed facts, that there is no testimony or circumstance amounting to evidence in a legal sense, supporting a conclusion that the large animal encountered by the locomotive in charge of Miller and Gross at 11:45 p. m. was one of the several animals observed by the witness Reese as the latter passed this point between 4:39 and 4:45 p. m.; and hence the holding and conclusion of the court that the failure of the defendant companies to drive out the cattle observed by Reese, or notify Miller and Gross of their presence upon the right-of-way, was the proximate cause of the derailment and the death of Miller and Gross is not supported by any legal evidence in this case, and that this Honorable Court, should so hold as matter of law. (Lee v. R'y Co., 89 Texas, 583; Choate v. R'y Co., 90 Texas, 88).

Tenth Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the twelfth assignment of error urged by appellants, and presented on page 148 of their brief on file, and embraced in paragraph twelfth of the motion for rehearing, com-

plaining that the trial court erred, to the prejudice of each of the defendants in its judgment and decree against them and in its conclusions of fact and law upon which the judgment is based, as set forth in paragraph numbered 5 of its findings and conclusions, as follows:

359 "I find that there is a substantial similarity between the laws of Louisiana and the laws of Texas giving right of action for injuries resulting in death, and under the law of Louisiana that Miller was not a fellow-servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death."

For the reasons (1) that there is no pleading on the part of the plaintiffs to justify such finding as a basis for judgment in this cause; and (2) that, under the undisputed facts in this case, in so far as same were admissible in evidence to support the plaintiffs' pleadings, the injury and death of Miller resulted from the risks and dangers of the service open and known to him and of which he assumed the risk.

Statement.

The testimony in this case, we insist, showed conclusively the following facts: (1) That the gates placed in the right-of-way fences were so established by defendant for the use and benefit of the adjacent land owners and their tenants, were equipped with reasonably effective appliances, and that adjacent land owners and their tenants were notified of and assumed the obligation to keep such gates closed; (2) that, notwithstanding the obligation assumed by the land owners and their tenants to keep such gates closed, they were often left open, and stock frequently entered through such gates onto the right-of-way and track; (3) that the facts and conditions above mentioned, in relation to these crossings and the trespassing of stock, were well and actually known to the engineer- and firemen generally operating trains over said railroad, and were open to the observation of Miller and Gross, and were actually known to them prior to the occurrence complained of.

The testimony supporting these conclusion we have set forth and quoted fully and in detail in the statement on pages 150-158 of appellants' brief, with references therein to the record, and showing the fact that Miller and Gross, during the three months prior to this occurrence, had encountered and killed stock repeatedly at open crossings at and in the vicinity of this wreck.

360

Authorities.

- Quill v. R'y Co. (T. C. A.), 46 S. W., 847.
- Quill v. R'y Co. (Sup. Ct.) 93 Texas, 616.
- R'y Co. v. Somers, 71 Texas, 702.
- Green v. Cross, 79 Texas, 131.

Eleventh Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the thirteenth assignment of error urged by appellants and presented on page 161 of their brief on file, and embraced in paragraph thirteen of the motion for rehearing, complaining that the trial court erred, to the prejudice of defendants, in rendering judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this: That, according to the undisputed evidence, the deceased was a man of considerable knowledge and experience as a locomotive engineer, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, being familiar with the method of fencing and maintaining gates along the right-of-way and enclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track, and within the enclosed right-of-way at such points as that at which this wreck occurred, and that, under the undisputed facts, and according to the law applicable thereto, the deceased William Miller had assumed the risk of the accident and injury, and neither of the defendants is liable therefor to the plaintiffs.

Statement.

We refer to the statement under tenth ground of error, *supra*.

Authorities.

See authorities under tenth ground of error, *supra*.

Twelfth Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the fourteen- assignment of error and the fifteenth assignment of error urged by appellants and presented on pages 162 and 164 of their brief on file, and embraced in paragraph fourteenth of the motion for rehearing complaining that the trial court erred, to the prejudice of the defendant, Texas & New Orleans Railroad Company, in admitting over the objection of said defendant printed rule No. 334 and Rule No. 420, set forth in defendant's bills of exception Nos. 2 and 3, which are hereby referred to, for the reasons that the same were irrelevant and immaterial to any issue of the case, so far as the Texas & New Orleans Railroad Company was concerned, and were rules for which, so far as the evidence indicated, this defendant was in no wise responsible.

And in this connection we insist that the point was appropriately preserved on behalf of the Texas & New Orleans Railroad Company, as shown in the bills of exception.

Statement.

In connection with the recitals in the opinion of the Court of Civil Appeals, we respectfully refer here to the statement under the fourteenth assignment of error, on pages 163 and 164 of the appellants' brief, and the statement under the fifteenth assignment of error, on pages 164 and 165 of said brief, showing the rules which were here offered and introduced in evidence over the objection of each of the defendants, to the effect that they were irrelevant and immaterial, it appearing that they were rules issued and promulgated by the Louisiana Western Railroad Company, and not by the Texas & New Orleans Railroad Company, or under its authority or direction.

Authorities and Remarks.

In view of the conclusions of fact and law on which the trial court based his judgment against the Texas & New Orleans Railroad Company, as well as its co-defendant, he undoubtedly considered this rule as a substantial part of the evidence of negligence. For example: In the fourth paragraph of the conclusions of fact the court used the following language: "And I find that it was the duty of defendants and section men upon the section upon which the said cattle were, to have removed said cattle, or failing so to do, that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right-of-way, and that they could have notified him, and in that case he could have been upon the lookout for said cattle, and probably have avoided striking the one which he did," etc., * * * "and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the said Miller notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Miller." (Tr. pp. 42 and 43.)

The regulations which were introduced and made the subject of this bill of exception No. 3 are referred to and covered by section fifth of the plaintiffs' petition. (Tr., p. 8).

We insist that the objection made, as shown in the bills of exception, by each of the defendants, that the rules offered were irrelevant and immaterial, was sufficient for the purpose of reserving the exception of the defendant Texas & New Orleans Railroad Company, and that the Honorable Court of Civil Appeals erred in its conclusion to the contrary.

Thirteenth Ground of Error.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the sixteenth assignment of error urged by appellants and presented on pages 166 and 167 of their brief on file, and embraced in paragraph fifteenth of the mo-

tion for rehearing, complaining that the tria court erred, to the prejudice of defendant Texas & New Orleans Railroad Company in rendering judgment against it jointly with its co-defend-
 363 ant, for the reasons: (1) That at the time of the wreck and injury of the said William T. Miller he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employe of the said defendant; (2) those servants or employes of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein, were not employes of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of *respondet superior*; (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Miller, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

Statement.

The facts show, without dispute, that the deceased William Miller, at the time of his injury, was operating a locomotive within the State of Louisiana on the railroad owned and controlled by the Louisiana Western Railroad Company, and subject to the orders and directions and control, at the time, of the officials and managers of the Louisiana Western Railroad Company, and that for such services as he was then performing he was to be compensated by the Louisiana Western Railroad Company, and that at the time of such injury he was not engaged in doing any service for the Texas & New Orleans Railroad Company, was beyond the limit of its railroad, was not being compensated for his particular service at that time by the Texas & New Orleans Railroad Company, and was in no sense under its direction, superintendence, or control, on this occasion.

The assistant superintendent, C. C. Mallard, (St. of Facts, pp. 32-36), E. E. Shackford (pp. 37-48), the section foreman, G. E. Bustin (pp. 53-58), the road-master, L. Lawlor (pp. 59-62),
 364 and the plaintiffs' witness William Reese (St. of Facts, pp. 1-9), the fireman, who claims to have observed the stock at the point of derailment between 4 and 5 o'clock in the evening, all of them, were engaged on this occasion upon the railroad and in the service and employment and pay of the Louisiana Western Railroad Company, and none of them in the particular service performed by them at the time were working for or responsible to the Texas & New Orleans Railroad Company, nor does the record indicate or render it conceivable that any person who, on the occasion of this derailment, was engaged in the actual service and pay of the Texas & New Orleans Railroad Company, and under its immediate direc-

tion, was in position to have prevented the derailment by removing the stock, or causing Miller to be warned.

Rules 334 and 420 introduced in evidence by plaintiffs, over the objections of the defendants, which manifestly entered into the consideration of the court in reaching its conclusions of actionable negligence in this case, were the rules promulgated by the Morgan's Louisiana and Texas Railroad and Steamship Company, and the Louisiana Western Railroad Company and not by the Texas & New Orleans Railroad Company; and there was not the slightest evidence, by recital or otherwise, indicating the promulgation of, or acquiescence in, the said rules and regulations by the Texas & New Orleans Railroad Company. (See Statement of Facts, pp. 20 and 21).

It is also true that the statements in the testimony of various witnesses, giving their opinions or conclusions as to the duty of removing obstructions or giving warnings to train operatives, with regard to stock upon the right-of-way, had reference to the railroad of the Louisiana Western Railroad Company, as controlled and managed and operated by it, and had no reference to the Texas & New Orleans Railroad Company or its railroad. (See entire Statement of Facts.)

Authorities and Remarks.

(1) The deceased, Miller, having voluntarily entered and
365 remained in the service of each of the defendants, with the understanding that he was to serve alternately for the one and for the other on their respective lines of railroad, receiving his pay from each of them in turn for the particular service rendered for them respectively, and acting under the immediate direction, supervision and control of that company for which at the time he was working, the Texas & New Orleans Railroad Company did not owe him any of the substantive duties ordinarily resting on the master toward the servant for the latter's safety in connection with the service rendered by him for the Louisiana Western Railroad Company on the latter's road, and while beyond the scope of its immediate direction, service and control. (T. & N. O. R. R. Co. v. Skinner, (T. C. A.) 23 S. W., 1001; Ellsworth v. Methanex, 104 Fed. Rep., 119; Mitchell Transfer Co. v. Ehmet, 55 L. R. A., 710; Brown v. Byroads, 47 Ind., 435.)

(2) The section foreman, train operatives, and other employes of the Louisiana Western Railroad Company, whose negligence is complained of as a proximate cause of the injury and death, not being at the time engaged in the performance of any service for the Texas & New Orleans Railroad Company, or under its immediate direction, the latter company would not be liable for the results of such negligence on the principle of *respondent superior*. (Cunningham v. R'y Co., 51 Texas, 503; A. & E. Enc. of Law, Vol. 20, pp. 181 and 178; Byrne v. Kansas City, Fort Scott R'y Co. et al., 61 Fed. Rep., 605; 9 C. C. A., 666; 24 L. R. A., 693; Powell v. Construction Company, 88 Tenn., 692; Hardy v. Shedden Co., Ltd., 47 U. S. App., 362; 37 L. R. A., 42 et seq.)

Fourteenth Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the seventeenth assignment of error urged by appellants and presented on page 176 of appellants' brief on file, and embraced in paragraph seventeenth of the motion for rehearing, complaining that the trial court erred in rendering its judgment and decree herein for the aggregate sum of six-
 365 teen thousand dollars, and that said amount is exorbitant and excessive, and beyond the amount which the plaintiffs are legally entitled to, under the evidence, and that such judgment is the result of the court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence, over the objection of defendants, and that it was incompetent and against the policies of the courts of the State of Texas, and against the spirit of comity between two several States for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas in such cases.

And in this connection we insist that the holding of this court to the effect that there was no error on the part of the trial judge in taking into account and considering the damage that the decedent, Miller, might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, and for the expense of his illness, is virtually and directly in conflict with the decision of the Supreme Court of Texas in *R'y Co. v. Richards*, 68 Texas, 378.

Statement.

William Miller was 41 years old at the time of his death; was a locomotive engineer, and drew an average of one hundred and seventy-five dollars per month. He left surviving him three children—one boy thirteen years old, one boy nine years old, and one girl six years old, and a widow forty-two years of age at the time of his death. (St. of Facts, pp. 12 and 13.)

Upon the trial of the merits of this case the plaintiffs were permitted over the objections of defendants, to prove that, according to the laws of Louisiana which would be applicable to this case, if prosecuted in the courts of that State, the following would be proper elements of damage allowable for the death of Wm. Miller to plaintiffs:

367 (1) The damage the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expense of his illness.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expense of his death and burial.

(3) Recovery for mental suffering of the survivors. (See St. of Facts, pp. 101, 102, 103.)

Authorities and Remarks.

The laws applicable to this case are those of Louisiana, and not of Texas, and this rule related not only to the right of action itself, but also to the extent of that right and the remedies and relief under it. (*De Harn v. R. R. Co.*, 86 Texas, 98, and *Slater v. Mexican National Railway Company*, 194 U. S., 48 L. Ed., 900. An essential part of the Louisiana right of action consisted in the measure of recovery. In this respect the right was far more substantial and extensive than the right under the Texas Statute. The Louisiana act allows compensation for different elements of damage that the decedent himself might have recovered, the loss by deprivation of the decedent's society and solace, and expenses of his death and burial, and also damages for the mental suffering of the survivors (St. of Facts, pp. 101 to 106); and it requires no citation of authorities to show that such elements of damage as these are not allowable under the Texas statute. The proof of these exceptional elements, allowable under the Louisiana law, was made by plaintiffs, over the objection of defendants (bill of exception No. 6, Tr. pp. 93 to 99); and the logical inference is, that these elements, constituting as they do parts of the right of action in the State of Louisiana, as fixing its extent and remedy, were considered and applied by the Honorable Trial Judge in arriving at the amount allowed and awarded them in his decree; at least there is nothing in the
368 record to indicate that, having admitted this evidence, over objection, as proof of the laws of Louisiana in these respects, he thereafter disregarded the effect of such testimony, and the natural presumption, strongly corroborated by the large sum awarded, is that he embraced in the amount of his judgment the allowance of these elements of damage. But these items, being substantial parts of the Louisiana right of action itself, marking its extent and measuring its relief, are entirely beyond the scope of the Texas statute; and in allowing such elements of damage, so in conflict with the laws of Texas on this subject, we respectfully insist that the trial judge has done that which, in the language of our Supreme Court, "the most liberal State comity cannot require" or justify.

In *Railway Company v. Richards*, 68 Texas, 378, Justice Stayton says:

"The most liberal State comity cannot, in reference to such a matter as that before us, require one State to enforce the laws of another when in conflict with its own law."

The Honorable Court of Civil Appeals, in its opinion rendered in the case of *R'y Co. v. Gross*, a companion to this case, decided at the same time and based on substantially the same facts, undertakes to sustain the action of the trial court in allowing these elements of damage in the following language:

"As hereinbefore mentioned, the Louisiana statute, in addition to the pecuniary loss sustained, allowed for the deprivation of the decedent's society and solace, expenses of his death, and also for mental suffering of the survivors. The point made is that our courts cannot or should not allow for such elements of damage as our legislature has seen fit not to provide for them in our statute. This right of action arose, not under our statute, but under that of Louisiana, which fixes both the right and the extent thereof. There exists no insuperable, or even inconvenient, difficulty, in arriving at the damages as allowed by the Louisiana statute, or in enforcing the judgment substantially in form and substance as would
 359 be done in that State. The right to recover damages existing, it would seem to be wholly immaterial whether the cause of action arises at common law or by statutes, especially so when the law of the forum recognizes and gives a similar right of action for the same cause. We can see no sound reason for recognizing the foreign statute, so far as it accords with what our statute allows in such cases, and refusing to give it any further enforcement on account of our statute which has nothing to do with the cause of action. The courts of this State should, in such cases, on principles of comity, hear and determine the right, as it exists, and enforce it in its entirety, or not at all."

We respectfully submit that the reasoning of the court in the language above quoted is not, upon principle, in conformity with the decisions of this State in the cases adjudicated by our Texas courts on the basis of comity. But if it were true, as maintained by the court, that principles of comity would permit our courts to award damages in this case for the deprivation of decedent's society, and his aid and support, and the expenses of his death and burial, as well as recovery for mental suffering of the survivors, none of which would be allowable under our Texas statute; yet the reasoning of the court at least could not justify the allowance to the survivors of those damages which the decedent himself might have recovered had he lived (such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness), which they were entitled to under the Louisiana act before, and without regard to the amendment of 1881, but which it was expressly held by the Supreme Court of Texas they could not recover or maintain an action for in the courts of this State. (*R'y Co. v. Richards*, 68 Texas, 378.)

Conclusion.

370 Wherefore, plaintiffs in error pray for writ of error to the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, and for citation as provided by law, and that upon hearing of this application the judgment of the District Court of Harris County and of the Honorable

Court of Civil Appeals be reversed, and for such other relief as petitioners may be entitled to.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD,
A. L. JACKSON,

*Attorneys for Plaintiffs in Error, Texas &
New Orleans Railroad Company and
Louisiana Western Railroad Company.*

(Endorsed:) No. 4410. In the Supreme Court of Texas. Texas & New Orleans Railroad Company et al., Plaintiffs in error, vs. Fannie Miller et al., Defendants in Error. Petition for Writ of Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 21, 1910. Jos. Murray, Clerk.

Copy of Judgment in Supreme Court.

In the Supreme Court of Texas.

T. & N. O. R. R. Co., et al.

vs.

FANNIE MILLER et al.

From Harris County, 4th District.

OCTOBER 26TH, 1910.

This day came on to be heard the application of T. & N. R. R. Co., et al., for a writ of error to the Court of Civil Appeals for the

Fourth District, and the same having been duly considered,

371 it is ordered that said application be refused. That the appli-

cants Texas & New Orleans Railroad Company and Louisiana

Western Railroad Company and their surety United States Fidelity

& Guaranty Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Motion for rehearing overruled Nov. 9, 1910.

Witness my hand and the seal of said Court, this the 11th day of November, A. D. 1910.

[SEAL.]

F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

(Endorsed:) T. & N. O. R. R. Co., et al. vs. Fannie Miller, et al., Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 12, 1910. Jos. Murray, Clerk.

Petition for Writ of Error in the Supreme Court of the United States.

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in Error,

vs.

FANNIE MILLER et al., Defendants in Error.

To the Hon. J. H. James, Chief Justice of the Court of Civil Appeals of Texas, Fourth Supreme Judicial District:

Your petitioners, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and the United States
372 Fidelity and Guaranty Company, respectfully show that in the above entitled cause then pending in the Court of Civil Appeals for the Fourth Supreme Judicial District on appeal from the District Court of Harris County, Texas, in and for the Eleventh Judicial District of Texas, wherein petitioners, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, were the only parties appellant and petitioner the United States Fidelity and Guaranty Company, a corporation, was the surety on the appeal bond of the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and Fannie Miller and George W. Miller, William D. Miller and Dorace H. Miller (the last three of whom were minors suing by their mother and next friend, Fannie Miller) were the only appellees, the said Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas on the 4th day of May, 1910, affirmed the judgment and decree in said cause theretofore rendered therein on the 30th day of January, 1909, by the District Court of Harris County, Texas, in and for the Eleventh Judicial District of Texas, in favor of the said Fannie Miller, George W. Miller, William D. Miller and Dorace H. Miller, as plaintiffs, and against petitioners, the Texas & New Orleans Railroad Company and La. Western R. R. Co. jointly and severally, for the aggregate sum of Sixteen Thousand Dollars, with interest thereon from the date of such judgment at the rate of six per cent. per annum and costs of suit, said aggregate judgment being awarded and distributed among the said plaintiffs and appellees in accordance with the decree in the trial court, as follows, to-wit: Eight Thousand Dollars to Mrs. Fannie Miller, Two Thousand Dollars to and for the benefit of George W. Miller, Two Thousand and Five Hundred Dollars to and for the benefit of William D. Miller, and Three Thousand and Five Hundred Dollars to and for the benefit of Dorace H. Miller; and the said Court of Civil Appeals in affirming said judgment entered its order and decree for the amount thereof, principal, interest, and costs, in favor of the said appellees, Fannie Miller,

373 George W. Miller, William D. Miller and Dorrace H. Miller, against petitioners, the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, and their security, the United States Fidelity and Guaranty Company.

That thereafter and in due time, on the 13th day of May, 1910, petitioners, the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, filed in said Court of Civil Appeals their motion for rehearing, which motion thereafter on the 25th day of May, 1910, was overruled and denied by said Court of Civil Appeals.

That thereafter and in due time, to-wit: on the 23rd day of June, A. D., 1910, petitioners Texas & New Orleans Railroad Company and Louisiana Western Railroad Company applied, in due form and as authorized by law, to the Supreme Court of the State of Texas for Writ of Error in said cause to the said Court of Civil Appeals, which application on the 26th day of October, A. D. 1910, was denied by the said Supreme Court of Texas and the writ of error prayed for was refused.

That thereafter on the 2nd day of November, A. D., 1910, petitioners Texas & New Orleans Railroad Company and Louisiana Western Railroad Company filed in and presented to the Supreme Court of Texas their motion for rehearing on said application, which motion on the 9th day of November, 1910, was overruled and refused by the Supreme Court of Texas, when and whereupon said judgment and decision theretofore rendered in the Court of Civil Appeals, which is the highest court of law or equity in the Said State of Texas in which a decision in said court could be had, became and is final.

Petitioners say that they are aggrieved by said judgment and the proceedings in said suit and that in said judgment and proceedings had prior thereunto in said cause manifest errors were committed, to the prejudice of petitioners, and each of them, because they say that in said suit rights, title, privileges, and immunities were and are claimed by petitioners under the Constitution and laws of the United States, and the decision and judgment in said suit was against the title, rights, privileges and immunities specially set up

374 and claimed by petitioners under said Constitution and statutes, as will more fully appear from the record of said cause and as shown especially by the defendants' pleadings, which set up Section 17 of the legislative act of Louisiana incorporating the Louisiana Western Railroad Company in bar of this action, and by reference to evidence set forth in the record, proving said section so plead, and by objections to the introduction in evidence of the certain statute or amendment enacted by the State of Louisiana in 1884 purporting to create the right of action upon which this suit or action was brought, such objections being evidenced by bills of exception in the record and by the First Assignment of Error, the Fifth Assignment of Error, the Sixth Assignment of Error, and the Eighth Assignment of Error, set forth and urged in appellants' brief in and before the said Court of Civil Appeals, and by the First,

Fifth and Sixth Grounds of Error in appellants' petition and application for writ of error addressed to the Supreme Court of Texas, and the First, Fifth and Sixth Grounds of the motion for rehearing of plaintiffs in error before the Supreme Court of Texas, and by the assignments of error now filed herein and in connection with and as part hereof; all of which documents and records petitioners pray your Honors to read and consider as parts hereof.

Your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because: (1) under Section I, Article IV, of the Constitution of the United States and Section 903 of the United States Compiled Statutes of 1901, page 677, petitioners, and each of them, have a right, title, privilege and immunity for and to the end that full faith and credit should and shall be given in the State of Texas and by the courts thereof to the public acts, records, and judicial proceedings of the State of Louisiana, including (a) that certain provision made in Section 17 of the legislative Act of the State of Louisiana passed and enacted by the Legislature of the State of Louisiana and duly approved by said state March 30th, 1878, known as Act No. 21, of 1878, creating the corporation of petitioner Louisiana Western Railroad Company, and exempting petitioner, the Louisiana Western Railroad Company, from the claim and liability sought and adjudged against petitioners, jointly, in this cause, (b) and that provision of the legislative act of the State of Louisiana known as Article 2315 of the Civil Code and the amendment thereof enacted in 1884 by the legislature of the State of Louisiana, creating the right of action in said state for injuries resulting in death, which provision terminates and extinguishes such right of action at the expiration of one year from and after the death, if suit is not brought thereon during such period of one year; and (2) under Section 10, Article I, of the Constitution of the United States petitioners, and each of them, have and had a title, right, privilege, and immunity from and against the impairment of the obligation of the Louisiana Western Railroad Company's charter contract with the State of Louisiana, wherein, by virtue of Section 17 of the incorporating legislative act aforesaid, it is exempt and immune from liability for and on account of the alleged losses and damages and occurrences involved in this cause and which have been claimed and adjudged against petitioners herein on the basis and authority of a right of action first created and existing in the State of Louisiana by the legislative act of said state passed and enacted and approved during the year 1884 and not existing prior thereto; and that the courts of the State of Texas, by the decision and judgment herein complained of, decided against such titles, rights, privileges and immunities which were specially set up and claimed by petitioners, as fully appears by the record of proceedings in said cause and which is herewith submitted.

Wherefore your petitioners pray the allowance of a writ of error,

returnable into the Supreme Court of the United States, and for citation and supersedeas; and so your petitioners will ever pray, etc.

TEXAS & NEW ORLEANS RAILROAD
COMPANY,

LOUISIANA WESTERN RAILROAD
COMPANY,

UNITED STATES FIDELITY AND
GUARANTY COMPANY, *Petitioners.*

JAMES A. BAKER, JR.,

EDWIN C. PARKER,

H. M. GARWOOD, &

A. L. JACKSON, *Attorneys for Petitioners.*

BAKER, BOTTS, PARKER & GARWOOD,

Of Counsel.

Let the writ of error issue as above prayed for, upon the execution of bond in the sum of Forty Thousand Dollars, such bond when approved to act as a supersedeas.

JOHN H. JAMES,

Chief Justice Court of Civil Appeals of Texas,

Fourth Supreme Judicial District.

(Endorsed:) In the Supreme Court of the United States. Texas & New Orleans Railroad Company, et al., Plaintiffs in Error vs. Fannie Miller, et al., Defendants in Error. Petition for Writ of Error in the Supreme Court of the United States. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, Clerk.

Writ of Error Bond.

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs
in Error,

vs.

FANNIE MILLER et al., Defendants in Error.

Know all men by these presents, That we, the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, and the United States Fidelity and Guaranty Company, as principals, and W. B. Chew and C. G. Pillot, as sureties, are held and firmly bound unto Fannie Miller, G. W. Miller, William D. Miller, and Dorace H. Miller, and to Fannie Miller as next friend, suing for the benefit of the minors G. W. Miller, William D. Miller, and Dorace H. Miller, in the sum of Forty — (\$40,000) Dollars, to be paid to them, the said Fannie Miller, G. W. Miller, William D. Miller and Dorace H. Miller, and the

said Fannie Miller as next friend, suing for the use and benefit of the said minors, G. W. Miller, William D. Miller, and Dorace H. Miller, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this the 12th day of November, A. D., 1910.

Whereas the above named plaintiffs in error have prosecuted a writ of error in the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas,

Now therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands this 12th day of November, A. D., 1910.

TEXAS & NEW ORLEANS RAILROAD
COMPANY,

LOUISIANA WESTERN RAILWAY
COMPANY,

By BAKER, BOTTS, PARKER & GAR-
WOOD, *Its Attorneys*,

UNITED STATES FIDELITY & GUAR-
ANTY CO.,

By EDWD. R. LEWIS,

*Manager Texas-Louisiana Dept.,
Principals,*

W. B. CHEW,

C. G. PILLOT, *Sureties*.

378 THE STATE OF TEXAS,
County of Harris:

Personally appeared before the undersigned authority W. B. Chew and C. G. Pillot, whose names are subscribed, as sureties, to the above and foregoing bond and each of them, having been duly sworn, stated upon his oath that he is worth at least the sum of Forty Thousand (\$40,000.00) Dollars over and above all of his exemptions and liabilities.

W. B. CHEW,
C. G. PILLOT,

Sworn to and subscribed before me this the 15th day of November, A. D., 1910.

[SEAL.]

M. E. SISSON,
Notary Public, Harris County, Texas.

If the foregoing bond were presented to me for approval I would approve the same.

[SEAL.]

C. DART.

*Clerk United States Circuit Court,
Southern District of Texas.*

By L. C. MASTERSON, *Deputy.*

I hereby approve the foregoing bond and the Sureties thereon this the 17 day of November, 1910.

JOHN H. JAMES.

*Chief Justice of the Court of Civil Appeals for the
Fourth Supreme Judicial District of Texas.*

(Endorsed:) In the Supreme Court of the United States. Texas & New Orleans Railroad Company, et al., Plaintiffs in Error vs. Fannie Miller, et al., Defendants in Error. Writ of Error Bond. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 17th, 1910. Jos. Murray, Clerk.

379

Certificate of Lodgment.

I, Jos. Murray, Clerk of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, do hereby certify that there was lodged with me as such clerk on November 17th, A. D., 1910, in the matter of The Texas & New Orleans Railroad Company, et al., Plaintiffs in Error, versus Fannie Miller, et al., Defendants in Error.

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in San Antonio, Texas, this 5th day of December, A. D., 1910.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY.

*Clerk Court Civil Appeals in and for Fourth,
Supreme Judicial District of Texas.*

380

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the suit between the

Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, the United States Fidelity and Guaranty Company, on the one hand, and Fanny Miller, Geo. W. Miller, William D. Miller, and Dorrace H. Miller, and Fanny Miller suing as next friend for the use and benefit of Geo. W. Miller, William D. Miller and Dorrace H. Miller, on the other hand, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission: a manifest error hath happened to the great damage of the said Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, and their surety, the United States Fidelity and Guaranty Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

381 gether with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Associate Justice of the United States, the 17th day of November, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the U. S. Circuit Court, Western Dist. Texas,
San Antonio.]

D. H. HART,

Clerk Circuit Court United States,

Western District of Texas,

By A. J. CAMPBELL, *Deputy.*

Allowed.

JOHN H. JAMES,

*Chief Justice Court of Civil Appeals, Fourth
Supreme Judicial District of Texas.*

UNITED STATES OF AMERICA,

Court Civil Appeals, Fourth Supreme Jud. Dist. of Texas;

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified

transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court of Civil Appeals in the City of San Antonio Texas this Dec'r 5" 1910.

[Seal Court of Civil Appeals of the State of Texas.]

JOE MURRAY,

Clerk Court Civil Appeals, Fourth Dist. of Texas.

381½ [Endorsed:] In the Supreme Court of the United States. Texas & New Orleans Railroad Company et al., Plaintiffs in Error, vs. Fannie Miller et al., Defendants in Error. Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, Clerk.

382 *Citation.*

THE UNITED STATES OF AMERICA, ss:

To Fannie Miller, G. W. Miller, William D. Miller, Dorrace H. Miller, and to Fannie Miller suing as next friend for the use and benefit of G. W. Miller, William D. Miller, and Dorrace H. Miller, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, wherein the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company and their surety, the United States Fidelity and Guaranty Company, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Court of Civil Appeals of the State of Texas, for the Fourth Supreme Judicial District, this the 17th day of November, 1910.

JOHN H. JAMES,

*Chief Justice Court of Civil Appeals of Texas for the
Fourth Supreme Judicial District of Texas.*

[Seal Court of Civil Appeals of the State of Texas.]

Attest:

JOS. MURRAY,

*Clerk Court of Civil Appeals, Fourth Supreme
Judicial District of Texas.*

I, John W. Parker, Attorney of Record for defendants in error, Fannie Miller, G. W. Miller, William D. Miller, and Dorrace H. Miller, and Fannie Miller, suing as next friend for the use and bene-

fit of G. W. Miller, William D. Miller, and Dorrace H. Miller, in the above entitled cause hereby acknowledge due service of the above and foregoing citation, by delivery of a copy thereof to me on this day, and hereby enter an appearance in the Supreme Court of the United States.

Witness my hand this the 18th day of November, A. D. 1910.

JOHN W. PARKER,

*Attorney for Fannie Miller, G. W. Miller, W. D. Miller
and Dorrace H. Miller, Defendants in Error.*

382½ [Endorsed:] In the Supreme Court of the United States.
Texas & New Orleans Railroad Company et al., Plaintiffs in
Error, vs. Fannie Miller et al., Defendants in Error. Citation. Is-
sued Nov'r 17" 1910. Jos. Murray, Clerk. Filed in the Court of
Civil Appeals, at San Antonio, Texas, Nov. 19, 1910. Jos. Murray,
Clerk.

383

Assignment of Errors.

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in
Error,

vs.

FANNIE MILLER et al., Defendants in Error.

Now come the plaintiffs in error in the above mentioned cause and respectfully submit that in the record, proceedings, decisions and final judgment in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas there is manifest error, in this:

1.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court should have sustained the pleas to the jurisdiction and in abatement of each of the defendants, the Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company, and by holding in this connection (1) that the right of action for injuries resulting in death in the State of Louisiana created by statute in that state was transitory and enforceable in the courts of Texas; (2) that the conflict and inconsistency between the laws of Louisiana and Texas as to the measure of damages and extent of recovery awarded for injuries resulting in death was not such as precluded the Texas courts from taking cognizance of the cause and enforcing the laws of Louisiana applicable thereto; (3) that the conflict between the laws of Texas and of Louisiana on the doctrine of fellow-servants, as a defense, was not such as to preclude the courts of Texas from taking cognizance

of the cause and administering the laws of Louisiana applicable thereto; and (4) that Section 17 of the act of March 30, 1878, 384 of the State of Louisiana incorporating the Louisiana Western Railroad Company and granting immunity from liability such as is sought to be fixed on the defendants in this case presents no such defense as should preclude the courts of Texas, on grounds of comity, from taking cognizance of this cause and administering the laws of Louisiana applicable thereto; and (5) that in connection with its holding last above mentioned said court by its action undertook to pass upon and construe said charter provision, holding against its validity, and thereby refused to give full faith and credit to the public act of the state of Louisiana, thus depriving plaintiffs in error of privileges, rights, and immunities to which they were entitled under the Constitution and statutes of the United States, as set forth and provided in Section I, Article IV, of the said Constitution, and Section 906 of the United States Compiled Statutes of 1901, page 677.

2.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before the said Court of Civil Appeals, to the effect that under and by virtue of Section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of William Miller and such immunity and exemption from liability was a matter of contract between the State of Louisiana and said corporation and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; that under the undisputed testimony and the authorities established before the trial court and appearing in the record Section 17 of the incorporating act was a valid and subsisting public act of the State of Louisiana and a valid and binding contract obligation between said state and the Louisiana Western Railroad Company, and that the judgment of the trial court in refusing to entertain the plea and approve said immunity provision as a 385 bar to the action, and in entering the judgment against plaintiffs in error deprived them of rights, privileges and immunities which they were entitled to under the Constitution and statutes of the United States of America, in these particulars, to-wit: (1) that the said court thereby failed and declined to give full faith and credit to the public legislative act of the State of Louisiana, as provided in Section I, Article IV, of the Constitution of the United States and Section 906 of the United States Compiled Statutes of 1901, page 677, and (2) that the act of the Legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State, so as to create and bring into existence for the first time in Louisiana the right of action asserted by plaintiffs and by authority of which the trial court rendered judgment against plaintiffs in error, as defendants below, would and did have the effect of impairing the obligation of petitioners' charter contract existing under

said Section 17 of the incorporating act, and thus would and did violate Section 10, Article I, of the Constitution of the United States.

3.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignments urged and presented before said Court of Civil Appeals, to the effect that the trial court should have excluded from the evidence, upon the objection of the defendants below, that certain testimony proving the legislative act of 1884 of the State of Louisiana, creating therein a right of action for injuries resulting in death such as that involved in this case, the objections urged to said evidence being as follows, to-wit: (1) that the evidence offered and introduced was not admissible or relevant under the plaintiffs' pleadings; (2) that the elements of damage allowed in Louisiana in a recovery by virtue of the statutory right of action in that state under said legislative act were not allowed under the laws of Texas in similar cases and could not afford

a basis of recovery in the Texas courts in such cases, and were
386 therefore irrelevant and immaterial; and (3) that Section 17 of the Act of 1878, of the State of Louisiana, incorporating the Louisiana Western Railroad Company, was plead and proven without dispute, as a bar to the action, and the failure to recognize it as such, on the part of the Texas courts, would and did involve (a) a refusal to give full faith and credit to the public act of the State of Louisiana, thus violating Section I, Article IV, of the United States Constitution, and (b) that the Louisiana Statute of 1884 here offered and introduced in evidence over the objections of defendants, if applied to the Louisiana Western Railroad Company, would and by such application did impair the obligation of its said charter contract, embraced in Section 17 of the incorporating act, and thus infringe Section X, (10), Article I, of the United States Constitution.

4.

Said Court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error, and refusing to sustain the assignments of plaintiffs in error, to the effect that the trial court should have sustained the general demurrer of plaintiffs in error, who were defendants below, and should have entered judgment in favor of defendants below for the reasons: (1) that the plaintiffs' petition on which trial was had, and being the only pleading of plaintiffs at any time filed or appearing in the record, while showing that the injury and death of Miller occurred entirely within the State of Louisiana and beyond the limits of the State of Texas, yet contained no reference to nor declaration upon any right of action afforded by the laws of Louisiana on behalf of the plaintiffs, for damages caused to them by such injury and death, and hence was subject to the general demurrer urged; (2) that it was not competent or permissible to cure the plaintiffs' petition against the general demurrer on the ground men-

tioned, by reference to allegations subsequently set up in the answers of defendants, without prejudice to the ruling on demurrers; 387 (3) that the pleading of defendants, which the Court of Civil Appeals referred to and relied on as curing the plaintiffs' petition for purposes of the demurrer and sustaining the judgment on the merits were to the effect that if plaintiffs had any right of action, (which was denied) it existed by virtue of legislative act of the State of Louisiana, but made no admission of such act as applicable, that could affirmatively cure the pleading of the plaintiffs on this especial point; and (4) that the defendants' pleadings referred to and relied on by the Honorable Court of Civil Appeals as supplying and affording to plaintiffs a declaration and suit on the Louisiana statute were not made nor filed in court until the 2nd day of April, 1908, the injury and death of Miller in Louisiana having occurred on June 1st, 1905, more than two years prior to the making and filing in court of such pleading, so that by the provision itself of Article 2315 of the Louisiana Civil Code, as amended in 1884, on which the Court of Civil Appeals bases its decision and judgment in favor of plaintiffs, their right of action so created had lapsed and become extinguished before any suit or declaration thereon had been filed or commenced; and the Court of Civil Appeals of Texas by affirming the judgment on such basis, notwithstanding this provision of the legislative act, failed to give full faith and credit to the public act of the state of Louisiana, thus infringing Section I, Article IV of the United States Constitution.

5.

Said Court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in its judgment and decree against them and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants were partners and were jointly liable, the facts in this case and the relations in this connection between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company being somewhat similar, but not so 388 strongly indicating partnership as the facts recited in the opinion of the Supreme Court in its decision of the case of *Peterson v. Chicago, Rock Island & Gulf R. R. Co.*, 205 U. S., 51 L. Ed. 851.

6.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred especially to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting, over its objections, certain printed rules set forth in the bills of exception Nos. 2 and 3, in the record, for the reason that said rules were irrelevant and immaterial to any issue in the case,

so far as the defendant Texas & New Orleans Railroad Company was concerned, the said rules and regulations having been issued and promulgated entirely under the authority and in the name of the Louisiana Western Railroad Company alone, and the proof showing, without dispute, that the Texas & New Orleans Railroad Company had nothing to do with the promulgation of said rules and that the injury and death in question occurred in Louisiana, beyond the line of the Texas & New Orleans Railroad Company, and that the train operated by the deceased engineer and fireman was not at the time being operated by the defendant Texas & New Orleans Railroad Company, or over any railroad line owned or controlled by it.

7.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in rendering judgment against it jointly with its co-defendant, for the reasons: (1) that at the time of the wreck and injury of the said William T. Miller he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employé of the said defendant; (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein, were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of respondeat superior; (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Miller, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

8.

Said Court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in its judgment against the plaintiffs in error, defendants below, and in its conclusions of fact and law upon which said judgment was based, and especially that portion of its said conclusions of fact and law being paragraph numbered 4 thereof, reading as follows, to-wit:

"I find that some hours previous to the derailment of Miller's locomotive, another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right-of-way, within a short dis-

tance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employes of defendants, in charge of one of the defendants' east-bound trains, gathered about the dead one, holding a 'ceremony' as expressed by one of the witnesses; that

390 the said cattle were probably attracted upon the right-of-way by the dead one; and I find that defendant knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open, cattle would probably be attracted therein by the dead one, or would enter therein of *its* own volition, and knew of the pressure of the cattle which were gathered about the dead one in time to have notified Miller of that fact, and in time to have had the said cattle removed from the right-of-way, and I find that it was the duty of defendants and the section upon which the said cattle were, to have removed said cattle, or, failing so to do, that it was the duty of defendants to notify said Miller of the presence of said cattle upon the right-of-way, and that they could have notified him, and in that case he could have been on the lookout for said cattle, and probably have avoided striking the one which he did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the said Miller notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Miller, and that plaintiffs were actually damaged by his death in the sum hereafter stated."

And in this connection we especially urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the fourth paragraph thereof, to the effect that the defendants were guilty of negligence in failing to remove from the right-of-way enclosure the cattle which were observed by their employe Reese, inside of the fence, or to notify the deceased of the presence of said cattle upon the right-of-way, and within such inclosure, it was necessary to show by some legal evidence the identity of the animal thereafter encountered by Miller's locomotive and causing the dertailment, as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there is no causal relation shown in the record be-

391 tween the negligence found by the court, in his conclusions, and the injury complained of, to support the judgment.

9.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, complaining that the trial court erred to the prejudice of defendants below in rendering judgment against them and

in its conclusions of fact and law found as a basis of said judgment, in this: that according to the undisputed evidence, the deceased was a man of considerable knowledge and experience as a locomotive engineer, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, being familiar with the method of fencing and maintaining gates along the right-of-way and enclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track, and within the enclosed right-of-way at such points as that at which this wreck occurred, and that, under the undisputed facts, and according to the law applicable thereto, the deceased William Miller had assumed the risk of the accident and injury, and neither of the defendants is liable therefor to the plaintiffs.

10.

Said Court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in rendering its judgment and decree in the aggregate sum of Sixteen Thousand Dollars, said amount being exorbitant and excessive and beyond the amount which the plaintiffs were entitled to (if any) under the evidence, and that the judgment in such amount resulted from the act of the trial court in applying the law of Louisiana on the measure of damage, which laws in this respect were introduced in evidence over the objection of defendants, and it was incompetent and
392 against the policies of the courts of the State of Texas, and against the spirit of comity between the two several states, for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas.

Wherefore, because of the errors assigned, plaintiffs in error pray that the judgment and decision of the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas be set aside and reversed.

JAMES A. BAKER, JR.,

EDWIN B. PARKER,

H. M. GARWOOD, &

A. L. JACKSON,

Attorneys for Plaintiffs in Error.

(Endorsed:) In the Supreme Court of the United States, Texas & New Orleans Railroad Company, et al., Plaintiffs in error, vs. Fannie Miller, et al., Defendants in Error. Assignment of Errors. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, Clerk.

393

Cost Bill.

Cost Bill in Court of Civil Appeals, San Antonio, Texas.

No. 4410.

T. & N. O. R. R. Co., Appellant,

vs.

FANNIE MILLER et al., Appellees.

From Harris County.

Principals: T. & N. O. R. R. Co.

Sureties: United States Fidelity & Guaranty Company.

Record Filed April 21, 1909; Disposed of May 25, 1910.

How Decided—Affirmed. Opinion by Neill, A. J.

| | |
|---|----------------|
| Filing Record | \$.50 |
| Docketing Cause | .50 |
| Appearances | 1.00 |
| Filing Briefs and other papers..... | 5.30 |
| Notices | 7.50 |
| Orders | 2.00 |
| Judgment | 1.00 |
| Recording opinion | 15.40 |
| Certificate with Seal | .50 |
| Taxing Cost | .50 |
| Certified Copy Bill of Costs..... | 1.00 |
| Mandate | 1.50 |
| Filing and Docketing Motion..... | .35 |
| Precept | 3.00 |
| Making Certified Copy of Motion..... | 30.45 |
| Sheriff's Fees | 2.25 |
| Transcript to Supreme Court United States and certificates..... | 198.00 |
| Fees of Clerk U. S. Circuit Court issuing writs..... | 2.00 |
| Issuing Citation | 1.00 |
| Costs in Court of Civil Appeals at Galveston..... | 8.95 |
| Transcript to Supreme Court..... | 1.50 |
| Express charges to and from Supreme Court..... | .60 |
| Costs in Supreme Court..... | 8.05 |
| Total | <hr/> \$292.85 |
| December 7th, By Cash | 91.35 |
| Balance Due | <hr/> \$201.50 |

THE STATE OF TEXAS:

I, Joe Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing
 394 Bill of Costs, for the sum of Two Hundred one & 50/100 Dollars is true and correct.

Given under my hand and seal of office this 8th day of December, 1910.

[SEAL.]

JOS. MURRAY, *Clerk.*

395

Authentication of Record.

I, Joe Murray, Clerk Court Civil Appeals, in and for Fourth Supreme Judicial District of Texas, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Texas and New Orleans Railroad Company, appellant vs. Fannie Miller, et al., Appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this December 5th, 1910.

[Seal Court of Civil Appeals of the State of Texas.]

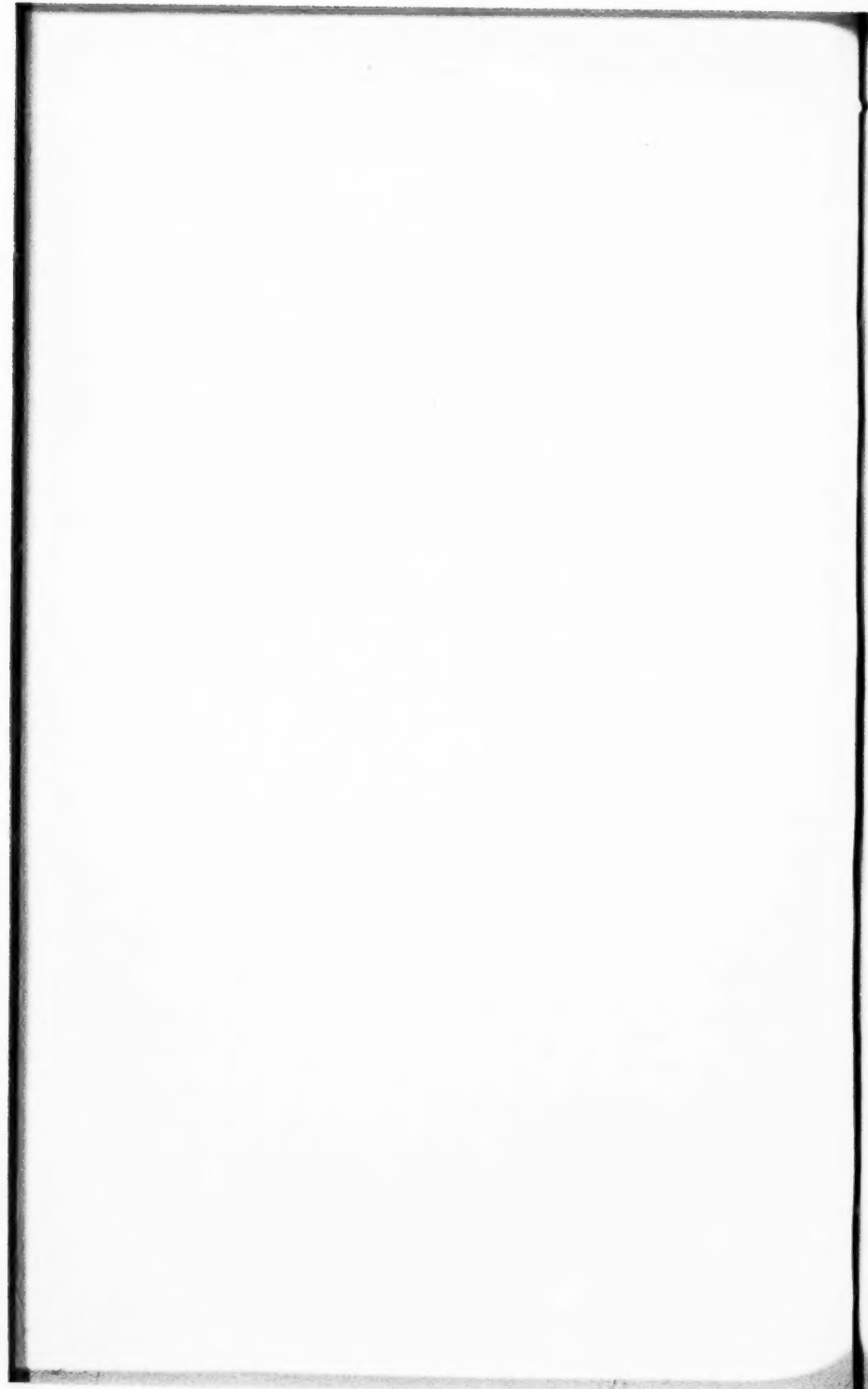
JOS. MURRAY,

*Clerk Court Civil Appeals, Fourth Supreme
 Judicial District of Texas.*

[Endorsed:] No. 4410. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio, Texas & New Orleans R. R. Co., Appellant, vs. Fannie Miller, et al., Appellees. Transcript to Supreme Court of the United States. J. Murray, Clerk.

Endorsed on cover: File No. 22,452. Texas court of civil appeals, fourth supreme judicial district. Term No. 831. Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and their surety, The United States Fidelity & Guaranty Company, plaintiffs in error, vs. Fannie Miller, G. W. Miller, William D. Miller, Dorace H. Miller, and Fannie Miller suing as next friend, &c. Filed December 27th, 1910. File No. 22,452.





Office Supreme Court, U. S.
FILED.

APR 15 1911

JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 831.

TEXAS & NEW ORLEANS RAILROAD COMPANY ET AL.,
Plaintiffs in Error.
vs.

FANNIE MILLER ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

MAXWELL EVARTS,
H. M. GARWOOD,
A. L. JACKSON,
Of Counsel for Plaintiffs in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 831.

TEXAS & NEW ORLEANS RAILROAD COMPANY
AND LOUISIANA WESTERN RAILROAD COM-
PANY, and their Surety, THE UNITED
STATES FIDELITY AND GUARANTY COM-
PANY,

Plaintiffs in Error,

VERSUS

FANNIE MILLER, G. W. MILLER, WILLIAM D.
MILLER, DORRACE H. MILLER and FANNIE
MILLER, suing as next friend, &c.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL
DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Statement of Case.

The motion of defendants in error, to dismiss the writ of error or to affirm the judgment below, without a full and regular hearing, is so general

in its terms and wanting in specific grounds that unless supplemented by the supporting brief of counsel it can furnish the court no tangible basis, for either branch of the relief sought ; and while the printed brief and argument subjoined and embraced with the motion attempts to show that the federal questions involved were not raised seasonably for purposes of jurisdiction of this Court and that these questions specially raised in the record and decided against plaintiffs in error are without merit, and suggest that the writ of error was taken only for the purpose of delay, yet we conceive that the statements and references in their brief do not convey a full or fair understanding of the federal questions involved or the manner in which they were raised and decided. Therefore plaintiffs in error, before undertaking to analyze and answer in detail the contentions urged by opposing counsel in support of their motion, respectfully submit the following as a more complete and accurate history of the federal questions involved, with the proceedings and manner in which they were raised and decided and their controlling importance in the adjudication of this cause.

This cause involves an action at law brought in the State District Court of Harris County,

Texas, by the defendants in error, Fannie Miller, surviving wife of William T. Miller, deceased, for herself and as next friend for the minor children, G. W. Miller, William D. Miller, and Dorrace H. Miller, against the plaintiffs in error, Texas & New Orleans Railroad Company, a corporation of Texas, and the Louisiana Western Railroad Company, a corporation of Louisiana, for the death of the husband and father, William T. Miller, occurring June 1st, 1905, while he was operating a locomotive engine drawing a passenger train on the line of the Louisiana Western Railroad Company, in the State of Louisiana, by reason of the derailment of said locomotive, such injury having been inflicted and the death resulting entirely within the State of Louisiana.

The defendant railroad companies interposed in due order pleas to the jurisdiction of the Texas court and thereafter general and special demurrers, which pleas and demurrers, submitted in their order, were heard and overruled by the Judge of the trial court, and thereafter the cause was tried on the issues of fact before the trial judge without a jury. As a result of the trial judgment was rendered January 30th, 1909, in favor of the plaintiffs and against de-

fendant railroad companies jointly, for the sum of Sixteen Thousand Dollars, with interest thereon from date of judgment at the rate of six per cent per annum (Record, p. 23).

The trial Judge in connection with the judgment filed his written findings of fact and conclusions of law (Record, pp. 24-27), which was duly excepted to by counsel for defendants below, and a statement of facts in due time was agreed upon, approved, and filed (Record, pp. 73-146).

The federal questions involved in this cause and the proceedings and orders raising and deciding them are as follows, to wit :

(1) The defendants below seasonably and in due order of pleading and in conformity with the rules of the State courts of Texas filed their pleas in abatement and to the jurisdiction of the State Court, asking to be discharged upon the ground that the alleged injury and death of Miller occurred entirely within the State of Louisiana, and that the laws of Louisiana, and not of Texas, bearing upon the right of action, if any, in the plaintiffs for such injury and death, as well as to the defences thereto, would apply, and that as the laws of the two States on the subject-matter involved

were so radically different, the said courts of Texas could not on principles of comity take cognizance of the cause or take judicial notice of the laws of Louisiana relating to the subject matter of the suit; that the laws of the two States were irreconcilable, especially on the elements of damage allowed and upon the rule as to master's liability for the negligence of fellow-servants of the deceased and upon the rule as to the assumption of risks in the employment as a defence to such action, and especially as Section 17 of the Legislative Act of the State of Louisiana incorporating the Louisiana Western Railroad Company, granted to said corporation immunity from any liability such as that asserted in this action, the injury and death of Miller must be deemed to have been assumed as a risk of his employment; and since his work was performed by him in Louisiana, it constituted under the jurisprudence of the State of Louisiana an absolute defence which would be in radical conflict with the principles and policies of Texas jurisprudence, and hence the Texas court could neither give effect to this immunity provision in a spirit of comity nor disregard it as a defence to this action without refusing to give full faith and credit to a public act of the State of Louisiana.

Section 17 of the incorporating act referred to is quoted on pages 4 and 5 of the brief for defendants in error in support of their motion.

These pleas to the jurisdiction, supported by uncontradicted testimony, were heard in due order by the trial Judge and were refused, to which ruling the defendants below excepted (Record, pp. 22, 27 and 51).

The point here involved was urged before the Court of Civil Appeals of Texas in paragraph One of the Assignment of Errors (Record, p. 64), and in the first ground of Motion for Re-hearing before that court (Record, pp. 162 and 163), and was presented in the First Ground of Error of the Petition for Writ of Error to the Supreme Court of Texas (Record, pp. 177 and 178). This assignment is discussed at length in the opinion of the Court of Civil Appeals (Record, pp. 150-157).

(2) The plaintiffs in error filed (Record, pp. 9, 10 and 14) and presented in due order general and special demurrers to the plaintiffs' petition (Record, pp. 1-6), contending that the pleadings showed affirmatively that the injury and death of Miller occurred in the State of Louisiana, and not in Texas, and failed to allege the existence of or to declare upon any right of ac-

tion in favor of the plaintiffs by statute or other law of the State of Louisiana for such occurrences as that described in the petition, and that as the laws of Texas forbade its courts to take judicial notice of the laws of Louisiana, such pleadings had failed to show a cause of action entitling plaintiffs to any relief. These demurrers were submitted and heard in due order and overruled by the trial judge (Record, pp. 22 and 23).

This point was presented before the Court of Civil Appeals of Texas in paragraphs 2 and 3 of the Assignment of Errors (Record, p. 64) and the Second Ground of Motion for Rehearing (Record, pp. 163 and 164), and by the Third Ground of Error in the petition for writ of error to the Supreme Court of Texas (Record, p. 211). After the rulings on the pleas and demurrers above-mentioned, and upon the trial of the cause on the facts, the defendants in error, who were plaintiffs below, offered in evidence certain portions of the deposition of H. P. Dart, a member of the New Orleans Bar, in reference to Article 2315 of the Civil Code of Louisiana as amended by an act of the Louisiana Legislature in the year 1884. This amended act created in

the State of Louisiana a right of action in favor of those occupying the relation of kinship that plaintiffs and the deceased occupied for injuries causing death, which right of action has continued since the amendment of 1884 and was at the time of the death of Miller and at the time of the trial of this cause the only authority given by the State of Louisiana for such a right of action. This Article 2315 as so offered in evidence by defendants in error on the trial below is set forth on page 4 of the brief of defendants in error.

The plaintiffs in error objected to the testimony for the reason, among others, "that the statutory law mentioned and described in the answer and deposition of said witness and offered, was not admissible, the plaintiffs not having alleged or declared upon the existence of such statute and law as the basis of action" and was "irrelevant and immaterial" (not having been declared upon nor alleged even by reference to defendants' answers until by its own provisions the right of action created had lapsed). The court overruled the objections and admitted the testimony so offered, to which the defendants below duly excepted. (See Bills of Exception, Record, pp. 54-60.)

The testimony of H. P. Dart here objected to was substantially as follows : The local statute which governs actions for personal injury as it exists to-day will be found printed in *Merrick's Annotated Edition of the Revised Civil Code of Louisiana* as Article 2315, page 559, and it is in the following language :

“ARTICLE 2315: Obligation to repair Damage Caused by Wrongful Acts; Survivorship of Action; ‘Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, *for the space of one year from the death.* The survivors *above mentioned* may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be” (Record, pp. 54 and 55).

It will be observed that Article 2315 of the Revised Civil Code of Louisiana of 1870 reads as follows :

“ARTICLE 2315 (2294). Every act whatever of man that causes damage to another

obliges him by whose fault it happened to repair it ; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death " (Record, p. 138).

In this form the statute was construed by the Louisiana courts as giving the survivors named, during the period of one year from the death, the right to recover simply those elements of damage or loss which the deceased himself would have been entitled to recover had he lived ; but it gave no right of action to those survivors for damages *sustained by them* on account of the death. *Vredenburg vs. Behan*, 33 La. An., 643. (See Record, pp. 142 and 143). The statute continued in the form last above quoted up to the time of the amendment of the year 1884, when the following words were added :

" The survivors *above mentioned* may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be " (Record, p. 142).

While the language added to this act by the amendment of 1884, as above quoted, created a new right of action for the damage sustained by the survivors themselves on account of the death of a relative (a right of action which did not exist in Louisiana before, *Van Amburg v. Ry. Co.*, 37 La. An., 652; *Eichorn v. Ry. Co.*, 112 La., 236; Record, pp. 142 and 143), yet the survivors referred to in this clause of the amendment as entitled to bring the action for the "damages sustained by them" are the same as those theretofore mentioned and given the right to recover damages to which the deceased would have been entitled if he had lived, and clearly the period fixed for the duration of such right of action given by the amendment is the same period "of one year from the death" as provided in the original act giving the right of action to survivors (Record, pp. 141 and 142).

The ruling of the trial court on this point was presented before the Court of Civil Appeals in paragraphs 6 and 8 of the Assignment of Errors (designated Fifth and Sixth Assignments of Error, in Appellants' Brief before the Court of Civil Appeals, Record, p. 65), and the Fifth and Seventh Grounds of Motion for Rehearing (Record, pp. 165, 166),

and was called to the attention of the Supreme Court of Texas in petition for writ of error, Fifth Ground of Error (Record, p. 215).

The judge of the trial court having admitted, over the objection of defendants below, the testimony of Mr. Dart and the evidence of the amended act of 1884 of the State of Louisiana creating the right of action in that State for injuries resulting in death, rendered judgment in favor of plaintiffs below because of this statutory right of action in Louisiana. The plaintiffs in error, objected to the judgment in this connection especially for the reason urged before the Court of Civil Appeals of Texas, in paragraph Four of the Assignment of Errors, being the Seventh Assignment of Error in Appellants' brief before the Court of Civil Appeals, reading as follows :

“ That the court erred to the prejudice of each of the defendants, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, in and by its judgment and decree and in its conclusions of fact and law, for the reason that there was a fatal variance between the plaintiffs' allegations and the facts proven, in this: that while evidence was introduced by and

on behalf of plaintiffs, over the objection of defendants, showing the existence of the statutory laws and codes of the State of Louisiana, and the construction thereof by the courts of said State, upon the existence and effect of which the judgment, if any, in favor of plaintiffs must stand, yet there was no pleading on the part of the plaintiffs, as to the existence or the effect of such statutes and other laws of the State of Louisiana, to justify the admission of the evidence thereof or to support a judgment on such theory, and therefore the pleadings of plaintiffs do not justify or support the judgment as rendered on the evidence" (Record, p. 64).

This point was called to the attention of the Court of Civil Appeals again as the Seventh Ground of Motion for Rehearing before that court (Record, p. 166), and was called to the attention of the Supreme Court of Texas by the Fourth Ground of Error contained in the Petition for Writ of Error before that court (Record, p. 213).

In undertaking to answer the assignments of plaintiffs in error before the Court of Civil Appeals of Texas, counsel for defendants in error, who were appellees in the Texas Court of Civil

Appeals, by way of an alternative proposition (set forth on page 26 of their brief in the Court of Civil Appeals) contended that even if the pleadings of plaintiffs below were in themselves demurrable, as tested by their language and effect standing alone, and were not sufficient to admit the evidence of the Louisiana statutory right of action as a basis of the judgment rendered thereon, yet these defects in the pleadings of plaintiff were cured by reference to the answers of the defendants below, stating the proposition in their brief as follows: "The court did not err in overruling defendants' general demurrers on the ground that there were 'no allegations in the petition as to the laws of Louisiana on the subject-matter of this litigation,' etc., because the defendants' answers supplied such allegations, if they were necessary at all" (Appellee's Brief, p. 26).

The plaintiffs in error, in response to this position, with leave of the Court of Civil Appeals filed therein before submission their Supplemental Brief combating the contention of counsel as to the availability of any allegations in the answers of the defendants below for the purpose of curing the pleadings of plaintiffs against demurrer or for the purpose of sustaining the

judgment founded on the Louisiana statute, and urging further that even if the allegations in the answers could be made available for this purpose, nevertheless not having been filed until the 2nd of April, 1908, more than two years after the injury and death of Miller, and involving a departure in pleading from the theory and allegations of the plaintiffs' original petition from fact to fact and from law to law, so as to constitute virtually the assertion of a new cause of action on the Louisiana statute, this new cause of action when first lodged and asserted had lapsed and terminated and had become extinguished by the express provisions of the Louisiana act creating it. This position was expressly asserted by appellants, with citation of authorities, on pages 7-10 of their Supplemental Brief before the Court of Civil Appeals of Texas, in the following language :

“ If, for the sake of argument, it be conceded that the answer of the defendant which was filed on the 2nd day of April, 1908, had the effect of supplying the omissions in plaintiffs' trial petition so as to save and cure it against the demurrer and make the declaration thereafter one on the Louisiana statute, nevertheless this action there-

upon would set forth and be a new and different cause of action from and after the date of filing such answer and one not theretofore declared upon, and thus commenced more than one year from the date of the death and at a time when the statutory right of action to the survivor had lapsed and become extinguished by the provisions of the act itself."

And in support of this contention before the Court of Civil Appeals the plaintiffs in error, as appellants, cited in their Supplemental Brief before the Court of Civil Appeals numerous authorities embracing several decisions of this Court, to the effect: (1) that the transition from the case made in plaintiffs' petition to that of the defendants' answers, as relied on to sustain the judgment for plaintiffs, involved a departure in pleading from fact to fact and from law to law such as to constitute the commencement of a new and different cause of action; (2) that the right of action in favor of the survivors under the Louisiana statute obtained for a period of one year only from the death, according to the provisions of that act, and such right had lapsed and became extinguished before the action on that statute was commenced by the filing of

defendants' pleadings and thereafter did not exist as a right potential or enforceable anywhere; and (3) that the provision of the statute fixing the one year limit for the life and duration of the right created constituted itself a part of the right and hence that statute at the time asserted or made available to plaintiffs no longer furnished even a *prima facie* right of action or basis for recovery, and that the ordinary rule requiring the statute of limitation to be specially pleaded did not apply.

But the Court of Civil Appeals, while holding that the pleadings of the plaintiffs below in their petition standing alone were subject to demurrer and were not sufficient to render admissible the statutes of Louisiana nor sufficient to support the judgment on the basis of the Louisiana statute, yet held that they were aided by the allegations with reference to the Louisiana statute and laws set forth in the answers of the defendants filed more than two years after the death of Miller, and although the Louisiana statute relied on as a basis for the judgment rendered showed by its express language that the right of action created by it had expired by the lapse of one year from the death before the pleadings of the defendants relied upon as a

declaration or suit available to the plaintiffs below had been filed.

The opinion of the Court of Civil Appeals of Texas rendered in passing on the assignments involving these points reads as follows :

“ The second assignment of error, which complains of the court's overruling the general demurrer of each defendant to plaintiffs' petition, presents a more serious obstacle to the affirmance of the judgment than the one just disposed of.

“ It appears from the face of the petition that the deceased, William T. Miller, died from injuries inflicted upon him entirely in the State of Louisiana, and outside the limits of the State of Texas. There was no allegation in the petition of any law in the State of Louisiana conferring a right of action upon anyone for injuries resulting in death. The insistence of defendants is that in the absence of such an allegation no cause of action was shown by the petition. The general rule is that the right to recover damages resulting from personal injuries is governed by the law of the place where the injury was received. This well-established rule applies to actions brought to recover damages for injuries causing death. If, therefore, there is no legislation of the

state where the injury causing death was inflicted, then no right of action exists. While, if the plaintiffs had pleaded that a cause of action for injuries resulting in death existed under the laws of Louisiana, the presumption might be indulged that the law there is the same as in this state; but we cannot perceive, in the absence of an averment of the existence of a law according such right of action, how its existence can be assumed. Such an assumption must be made, before it can be presumed that the law of another state is the same as ours. The rule is general, that in the absence of an express statute of the forum to the contrary, the court will not take judicial notice of the law of a foreign country. This principle applies to the laws of another State of the Union; in other words, the several states of the Union are foreign to each other for the purposes of this principle. When, then, as in this case, the right of action necessarily rests upon a foreign law, the existence of the law must be averred in order to disclose such right. When such an averment is made, the presumption in the absence of evidence to the contrary, that such law is the same as that of Texas is simply taken as proof of the averment, but it does not supply the averment as well as

furnish the proof. But when the answer of defendants, which pleads the laws of Louisiana upon which the action is grounded, is looked to and considered in connection with the averments in the petition this defect is cured. *Lyon v. Logan*, 68 Tex., 524; *Boettler v. Tindick*, 73 Tex., 488; *Hill v. George*, 5 Tex., 89; *Grimes v. Hagood*, 19 Tex. 246; *Bourke v. Vanderlip*, 22 Tex., 222; *Gaston v. Wright*, 83 Tex., 282; *National Bank v. De Berry*, 105 S. W. 1,000.

"We, therefore, overrule appellant's second assignment of error. The effect of this ruling is to in like manner dispose of the third assignment, which complains of the court's overruling defendants' special exceptions to plaintiffs' petition, the ground of the exceptions being substantially that urged under their general demurrer." (Record, pp. 157 and 158.)

"The fourth, fifth, sixth and seventh assignments and the propositions asserted thereunder all relate to the action of the court in admitting evidence as to what the statute law of Louisiana was in relation to actions for injuries resulting in death, the admission of such evidence being complained of upon the ground that there was no allegation in plaintiffs' petition authorizing thereof. Since, as we have held, the omis-

sion of such allegation was supplied by the defendants' pleading such law, it follows that such evidence was properly admitted." (Record, p. 160).

The fourth assignment mentioned above in the court's opinion was paragraph 4 of the assignment of errors (Record, p. 64) complaining that the pleading of plaintiff in the particular mentioned was not sufficient to support the judgment rendered on the theory of the Louisiana statutory right of action; and the fifth, sixth, and seventh assignments here mentioned in the court's opinion have reference to paragraphs 6, 7, and 8 of the assignment of errors (Record, p. 65), referring to the evidence to which objection was made, as shown by bills of exception (Record, pp. 54-61).

From the above quoted extract of the opinion of the Court of Civil Appeals it will be observed that while that court held distinctly that the plaintiffs' petition contained no allegation of or declaration upon the statutory right of action in Louisiana and for this reason standing alone was demurrable and would not justify the admission of the evidence offered to show such statute or its effect nor sustain the judgment on such theory or basis, yet that these omissions and defects were cured in that the pleadings of defendants

filed in this cause in April, 1908, more than two years after the death of Miller, sufficiently referred to and declared upon the Louisiana statutory right of action and were available to the plaintiffs below for the purpose of curing the petition against demurrer and supporting the judgment in favor of plaintiffs. Assuming that the trial Judge based his ruling on the demurrers and his judgment in favor of the plaintiffs below on the allegation of this Louisiana statutory right of action as set forth in defendants' answers filed in April, 1908,—the only hypothesis on which the Court of Civil Appeals according to its opinion would permit such judgment to stand is,—that the trial Judge while so rendering judgment on the authority of this Louisiana statute necessarily ignored the provisions thereof fixing the period of its duration to one year from the date of the death, and the Court of Civil Appeals likewise ignored and disregarded this provision and failed to give it full faith and credit as a public act of the State of Louisiana, while at the same time resorting to it to sustain the judgment of the trial court rendered in this case.

The plaintiffs in error in the Court of Civil Appeals of Texas urged this point further in

their motion for rehearing before that court by the Second paragraph of their motion in which again they set forth fully the contentions and authorities embraced in their Supplemental Brief before that court, above quoted (Record, pp. 163 and 164), and this Motion for Rehearing was overruled (Record, p. 176). These points were involved and presented also to the Supreme Court of Texas in the Second and Fourth Grounds of Error of the Petition for Writ of Error to that Court (Record, pp. 195-196 and 213), which petition for Writ of Error was refused (Record, p 249).

(3) Upon the trial of this cause on the facts the defendants in error, offered in evidence certain portions of the depositions of H. P. Dart as an expert on the laws of Louisiana, and in connection therewith Article 2315 of the Civil Code of Louisiana as amended by an act of 1884 of the Louisiana Legislature, and which by virtue of this amended act created and brought about for the first time in the state of Louisiana a right of action in favor of those occupying the relation of kinship that plaintiffs and the deceased occupied, for injuries causing death, and which right of action has continued since the amendment of

1884 and at the time of the death of Miller and at the time of the trial of this cause was the only legal basis in the State of Louisiana for such a right of action. The plaintiffs in error objected to the testimony so offered, for the reasons (1) that it was irrelevant and immaterial; (2) that the statutory law mentioned and described in the deposition of said witness was not admissible, the plaintiffs not having alleged or declared upon such statute and law as a basis of action in their pleadings; and (3) that the right of action, if any, created or attempted to be created by the statute mentioned and described in said deposition was enacted by the Legislature of Louisiana after the enactment and approval by said Legislature of the act of 1878 incorporating the Louisiana Western Railroad Company, which was a valid public act of the State of Louisiana, and that in so far as the action for injuries resulting in death was afforded by the amended Article 2315 offered in evidence and sought to be declared upon and enforced against the defendants, it would impair the obligation of a charter contract and violate the immunities and exemptions stipulated in Section 17 of the act of the Legislature of Louisiana of 1878, incorporat-

ing the Louisiana Western Railroad Company, and that Article 2315 as amended by the Legislature of Louisiana of 1884 so as to give the right of action here asserted would have the effect of impairing the obligation of a contract in violation of the provisions of the United States Constitution. The court overruled these objections and admitted the testimony so offered, and the plaintiffs in error, duly excepted (See Bills of Exception, Record, pp. 54-60).

This point was urged before the Court of Civil Appeals of Texas in paragraphs 6 and 8 of Assignment of Errors, being the Fifth and Sixth Assignments of Error in Appellants' Brief before the Court of Civil Appeals (Record, p. 65), and Fifth and Seventh Grounds of Motion for Rehearing (Record, pp. 165 and 166), and was called to the attention of the Supreme Court of Texas in Petition for Writ of Error, Fifth Ground of Error (Record, p. 215). The points involved in these assignments and urged before the Court of Civil Appeals of Texas were expressly considered and passed on adversely in the written opinion of the Court of Civil Appeals (Record, pp. 157, 158 and 160).

(4) Upon the trial of this cause on the

facts the plaintiffs in error, in support of and in conformity with their answers and pleas in bar (Record, pp. 11 and 12) proved as a fact, without dispute, that the Louisiana Western Railroad Company, which owned and was operating a railroad company in Louisiana on which Miller was employed and actually engaged as a locomotive engineer at the time and place of his injury and death, was incorporated and had acquired and was so operating its railroad properties and business under and by virtue of Act No. 21 of the Louisiana Legislature of 1878, approved March 30th, 1878, and printed on pages 258-268, inclusive, of said acts under authority of the State of Louisiana, incorporating the Louisiana Western Railroad Company, and that Section 17 of this act provided

“ That said company, its officers or employes shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life * * * caused by any accident or alleged carelessness or negligence on the part of said company, its officers or employes * * * while the person whose death or personal injury shall

have been caused by any such accident or alleged carelessness or negligence shall have been at work or rendering any service as an employe of said company or as an employe of any person or persons with whom said company may have contracted for such work or service upon or in connection with its railroad or any other railroad or transportation line occupied and operated by it" (Record, p. 137.)

It was further proven in this connection, without dispute, that at the time of passing this act of 1878 the State Constitution of Louisiana had no provision inhibiting the granting to a corporation or individual any special or exclusive right, privilege or immunity such as this State inserted in the Constitution adopted some years after the passage and approval of this incorporating act; also that at the time of passing this incorporating act there was no right of action in and under the law and jurisprudence of the State of Louisiana for injuries resulting in death, such as that asserted in this cause, such right of action in Louisiana having been first created by the amended act of 1884 (Record, pp. 133-139, 141-146).

It was further shown without dispute that similar provisions to Section 17 of this incorpor-

ating act enacted by the Legislature of Louisiana under the same Constitution had been construed and sustained as valid by the Louisiana courts; (*Heirs of Gossin v. Williams et al.*, 36 La. An., 187; *St. Julien v. Railroad Company*, 39 La. An., 1063; *Louisiana Western Railroad Company v. Louisiana Central & Improvement Company*, 119 La., 927); and there has been no amendment or alteration of the provisions in Section 17 of the incorporating act by the Legislature or courts of Louisiana, and this incorporating act containing Section 17 has been classed as a *public* as well as a special act of the State of Louisiana (Record, pp. 136 and 137).

Under this status of the pleading and proof plaintiffs-in-error insisted that Section 17 of the incorporating act was a valid and vested right in the corporation so created, fixed by the Legislative General Assembly of Louisiana, being a public act of that State and entitled to full faith and credit as such, and that if the amended act of 1884 of the State of Louisiana creating a right of action for injuries resulting in death was intended by the Legislature to apply and was now to be applied to the Louisiana Western Railroad Company, such legislation thereby would impair the obligation of a contract between said corporation and the

State of Louisiana, and to this extent would be void as infringing Section 10, Article I., of the Constitution of the United States. The trial Judge in his decision in favor of the plaintiffs below decided against this defence and thereby declined to give full faith and credit to a public act of Louisiana within the meaning of the Constitution of the United States, and by adopting the Louisiana amended act of 1884 as the basis and authority for his judgment gave it a construction which impaired the obligation of a charter contract.

The point here involved was presented before the Court of Civil Appeals of Texas in paragraph 5 of the Assignment of Errors, this being the Eighth Assignment of Error in Appellants' Brief before the Court of Civil Appeals (Record, pp. 64 and 65), and in the Eighth Ground of the Motion for Rehearing in that court (Record, pp. 166 and 167), and was presented to the Supreme Court of Texas in the Sixth Ground of Error contained in the Petition for Writ of Error before that Court (Record, 217 and 218).

The Court of Civil Appeals in passing upon the assignment involving these points and affirming the judgment of the trial court expressly decided the federal questions adversely to plaintiff.

iffs in error. (See Opinion, Record, pp. 157 and 160 and 161).

It will be observed that the Court of Civil Appeals in concluding its opinion on this point used the following language :

“ So we take it that if the provision in the charter ever had any force it was in effect repealed by the act of 1884, giving certain persons a right of action for the death of a relative caused by negligence ” (Record, p. 161).

The several points above enumerated, involving federal questions and decided adversely to plaintiffs in error, together with other points of error urged against the decision of the State courts, are presented and covered fully in the Assignment of Errors addressed to this Court and filed in connection with the Petition for Writ of Error to this Court (Record, pp. 250 and 258-265).

The Petition for Writ of Error to have the judgment and proceedings reviewed by this Court was presented in due time to the Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas and allowed by him upon the execution of Writ of Error Bond with

sufficient sureties, approved by the Chief Justice, in the sum of Forty Thousand Dollars, to operate as a supersedeas (Record, pp. 250-255).

Under the rules of practice of Texas courts the appellant or plaintiff in error is required to designate the assignments of error insisted upon in the appellate court by numbers in the numerical order in which they are presented in his brief before that court, without regard to the order in which they are paragraphed in his assignment of errors filed below and which becomes a part of the record. Thus it happens that the number of the assignment as set forth in the brief and referred to in the appellate court's opinion cannot invariably be identified by reference to the original assignment of errors appearing in the record. For this reason we have procured the clerk of the Court of the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas to prepare and furnish certified copies of the briefs of the parties in this cause on file in that court and upon which the cause was submitted, and we have forwarded to be deposited with the files of this Court such certified copies of briefs, to-wit: "Appellants' Brief," "Appellees' Brief," and "Appellants' Supplemental Brief," with file marks thereon duly certified and marked

Exhibits A, B, and C, respectively: not as claiming that the same constitute strictly any part of the record of this cause, but in order to illustrate and explain some portions of it, and especially as to the precise points involved in the written opinion and decision of the Court of Civil Appeals (*Land & Water Co. vs. San Jose Ranch Co.*, 189 U. S., 179-181; *Philadelphia Fire Association vs. New York*, 119 U. S., 110-129).

BRIEF OF THE ARGUMENT.

FIRST POINT.

The immunity provision contained in Section 17 of the incorporating act of the Louisiana Western Railroad Company was specially set up by plaintiffs in error as a valid public act of the State of Louisiana, and the decisions of the State courts of Texas were adverse to this contention and such decisions necessarily failed and declined to give full faith and credit to that portion of a public act, within the meaning of the Constitution of the United States requiring such faith and credit.

Replying to the suggestion of counsel for defendants in error, made on pages 8 and 9 of their

brief in support of this motion, that this point was not expressly urged by plaintiffs in error until the filing of their Motion for Rehearing in the Court of Civil Appeals and that it does not "appear to have been ruled upon by the Court of Civil Appeals," we submit that by virtue of the pleas setting up this provision, both by way of abatement and to the jurisdiction and in bar of the action, as a valid legislative act of the State of Louisiana giving the defendants below a complete defense to the action, and following this up with exceptions to the adverse rulings and orders of the court upon the admission of evidence and entering the final decree, with assignments thereafter in the Court of Civil Appeals and Motion for Rehearing upon the adverse decision and opinion by the Court of Civil Appeals, it is demonstrated beyond question that the substance of the point was fully raised and presented by plaintiffs in error and involved in the case from the beginning to the end of the litigation in the State courts, so that each of the courts necessarily decided, in entering and sustaining the judgment for plaintiffs, that Section 17 of the incorporating act so pleaded and proven was not valid as a public act of the State of Louisiana. The language and effect of

the provision was clear and unequivocal and there could be no question of its effect as a complete defence to the action if found valid and given "full faith and credit." The necessary result, therefore, of the adverse rulings, orders, and final judgments of the State courts was to refuse full faith and credit to the act and this has necessarily infringed the provisions of the United States Constitution. It is true the Court of Civil Appeals in its opinion, after stating at length its reasons for questioning the validity of this act *ab initio* and as affected by subsequent legislation of Louisiana, concluded with the following language :

"So we take it that if the provision in the charter ever had any force, it was in effect repealed by the act of 1884 giving certain persons a right of action for the death of a relative caused by negligence" (Record, p. 161).

Whether we are to infer from this language that the Honorable Court of Civil Appeals inclined to the view that the act was void *ab initio*, or voidable at the option of the State by subsequent legislation, is immaterial ; for the decision by declining to respect it as a defense involved necessarily a failure to give it at *this* time full

faith and credit as a public act of Louisiana and hence an obligation of contract which was not subject to impairment by the subsequent legislative act of 1884. These questions were of controlling importance in the record and the decision of them could not be avoided.

"The refusal to consider a federal question which is controlling in a case is equivalent to a decision against the federal right involved therein."

Des Moines Nav. Co. v. Iowa Homestead Company, 123 U. S., 552.

In order to show that the Court of Civil Appeals decided a given federal question it is not necessary that the express language of the opinion should so recite, but for the purpose of jurisdiction of this Court it is sufficient that the State court by its decision "necessarily adjudicated the defence claimed" under the Louisiana incorporating act (*El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S., 90; *Wabash Railroad v. Adelbert College*, 208 U. S., 38-44; *A. T. & S. F. Ry. Co. v. Sowers*, 213 U. S., 55; *Land & Water Co. v. San Jose Ranch Co.*, 189 U. S., 179-181; *Philadelphia Fire Assn. v. New York*, 119 U. S., 110-139; *Murdock v. Mayor of Memphis*, 20 Wall., 590; *Mallett v. North Carolina*, 181 U. S., 588-590).

SECOND POINT.

The immunity provision contained in Section 17 of the act incorporating the Louisiana Western Railroad Company was a contract, within the meaning of the United States Constitution, the obligation of which could not be impaired by subsequent legislation of the State of Louisiana, and this point was specially set up by plaintiffs in error, was necessarily involved, and expressly decided against the plaintiffs in error by the State courts of Texas.

Counsel for defendants in error in their brief supporting the motion to dismiss or affirm (p. 9) appear to concede that this question was specially set up by plaintiffs in error and decided against them by the State courts, but presumably for the purpose of showing that there is no merit in the point and that the contentions are frivolous and made for delay, they contend in their brief (pp. 10 and 11) that the provision of the incorporating act in question would tend, if upheld as irrevocable, to encroach upon the police power of the State; and that the amended act of Louisiana of 1884 creating the right of action for injuries resulting in death was enacted by

the legislature of Louisiana in the exercise of its reserve police power, and as a police regulation this act extended to and repealed Section 17 of the incorporating act without impairing the obligation of a contract, within the meaning of the United States Constitution. Counsel for defendants in error accordingly contend: (1) that the provisions of Section 17 of the incorporating act were originally void, and (2) that if not void originally, nevertheless they were made subject to the reservation in the State of the right to repeal them by general legislation.

Under the first contention counsel insist (on page 9 of their brief supporting this motion) that Section 17 of the incorporating act was not originally valid because it was violative of Section 1 of the Fourteenth Amendment of the United States Constitution and Article IV., Section 2, of the Constitution, in that by enacting such legislation the State of Louisiana denied to persons "within its jurisdiction the equal protection of the laws." The right of action for damages sustained by surviving persons on account of the injuries causing the death of their relative did not exist as against any one in the State of Louisiana at the time this incorporating act was en-

acted. While the statutes of Louisiana as embraced in the Civil Code of 1870 afforded a right of action for personal injuries to the person injured through fault of another, and in the event of his death this right of action in him survived in favor of the certain relatives mentioned, enabling them for the period of "*one year from the death*" to recover that which the deceased if still living would have been entitled to, and this continued to be the general law in Louisiana until the amendment of 1884; yet the right of action in favor of the relatives for damages sustained by them on account of death first came into existence in that State by the amendment of 1884, adding to the original article the following language, construed by the courts of Louisiana to create a new right of action in the survivors before-mentioned, to-wit:

"The survivors *above mentioned* may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

It is the right of action created by this amendment *alone* that is involved and is material as a basis of the action and the judgment in this cause. And since this right of action did not exist in Louisiana against any person within the juris-

diction of that State at the time of granting this immunity and guarantee against such liability in the charter of the Louisiana Western Railroad Company, the contention that the incorporating act by this provision denied "to any person within its jurisdiction the equal protection of the laws," we submit, is clearly untenable.

In line with their contention that this amended act of 1884 creating for the first time in the State of Louisiana rights of action to surviving relatives for damages to them by reason of the death of the injured party was enacted under the reserve police power of the State, counsel assert (on page 10 of their brief) that, conceding that the exemption and immunity set forth in Section 17 of the incorporating act was originally valid, yet the legislature of Louisiana could repeal or annul the same by subsequent legislation, and cite in support of this position the opinion of this Court in the case of *Pennsylvania Railroad Company v. Miller*, 132 U. S., 75, and authorities therein cited. But we respectfully suggest that neither the decision in that case nor the language of the Court, nor the cases therein cited are authority for the position taken by counsel for the defendants in error.

As we understand the facts in the case of *Pennsylvania Railroad Company v. Miller*, the Company had been incorporated by a legislative act of Pennsylvania in 1846 and was given the power of eminent domain, with provision for payment for property *taken* in the exercise of this power, but without any requirement expressly made for payment of damages for the injury or destruction of property *not* actually taken; and it seems that this was the rule enforced and recognized by the courts of Pennsylvania up to the adoption of the new constitution of that State which took effect January 1st, 1874, which constitution for the first time made provision for compensation to the owners of property not only as to that *taken* but also that property "*injured or destroyed* by the construction or enlargement of their works, high-ways or improvements, which compensation shall be paid or secured before such taking, *injury or destruction.*" There was no contention nor ground for contending in that case that the Pennsylvania Railroad Company had a special contract of immunity from this liability in the act incorporating it, as part of its charter, and this circumstance was recited by this Court in its opinion, as well as in the opinion of the

State court of Pennsylvania from which the writ of error was taken to this Court; and it was conceded by the Pennsylvania State court, as well as by this Court, in their respective opinions, that if the charter of the railroad company had embraced such immunity it would have been inviolable. The Supreme Court of the United States in its opinion, referring to the opinion of the Supreme Court of Pennsylvania, uses the following language at page 81 :

“ That court gave its assent to the principle that the charter of the defendant was inviolable. It further stated that the framers of the Constitution of 1873 did not intend to repeal any of the provisions of that charter. It held that Section 8 of Article XVI of that Constitution included not only then existing municipal corporations, but also then existing other corporations.”

The further language of this Court in the decision of that case clearly distinguishes it from the record in this case. The court in approving the decision of the State court of Pennsylvania in that case says at page 82 :

“ We think these views are sound. There was no such contract between the State and

the defendant prior to the Constitution of 1873 as prevented the subjection of the defendant by that Constitution to the liability for consequential damages arising from its construction of this elevated road in 1880 and 1881. Prior to the Constitution of 1873, and under the constitutional provisions existing in Pennsylvania before that time, the Supreme Court of that State had uniformly held that a corporation with such provisions in its charter as those contained in the charter of the defendant, was liable, in exercising the right of eminent domain, to compensate only for property actually taken, and not for a depreciation of adjacent property. The eighth section of Article XVI of the Constitution of 1873 was adopted in view of those decisions, and for the purpose of remedying the injury to individual citizens caused by the non-liability of corporations for such consequential damages. Although it may have been the law in respect to the defendant, prior to the Constitution of 1873, that under its charter and the statutes in regard to it it was not liable for such consequential damages, yet *there was no contract in that charter*, or in any statute in regard to the defendant, prior to the Constitution of 1873, that it should always be exempt from such liability, or

that the State by a new constitutional provision, or the Legislature, should not have power to impose such liability upon it, in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, *since there was no prior contract* with the defendant, exempting it from liability to such future general legislation, in respect of the subject matter involved. * * *

“Nor will the exemption claimed from future general legislation either by a constitutional provision or by an Act of the Legislature, be admitted to exist, *unless* it is expressly given, or *unless* it follows by an implication equally clear with express words.”

Counsel for defendants in error in their brief (on page 13), quoting the language of this Court, used by way of illustration an analogy which reads as follows :

“The imposition of such a liability is of the same purpose as the imposition of a liability for damages for injuries causing

death which result from negligence upon corporations which had not been previously subjected in their charters to such liability."

Referring to the cases cited in this connection by this Court, we find but one of them which appears to have involved the principle as applied to such an action for injuries resulting in death. This is the case of *Southwestern Railroad Company v. Paulk*, 24 Ga., 356, and referring to the report of this case, we find the record does not disclose the pre-existence of any contract (express or implied), the charter of the railroad company there involved having the effect of granting immunity against any such liability; but the contention involved appears to have been that simply because the railroad company had been chartered theretofore under the general law without referring to any such liability, and at a time when no such liability existed in the State either at common law or by statute, the subsequent enactment of a statute creating such right of action would impair the obligation of a contract.

The case of *Duncan v. Pennsylvania Railroad Company*, 94 Pa. State, 443, also cited in this connection, involved practically the same matters as those in the Miller case before this court, and the Pennsylvania State Court in that case, for

purpose of analogy, refers to the fact that the Pennsylvania Railroad Company was incorporated at a time when no right of action existed for injuries resulting in death in the State of Pennsylvania and had never complained of the subsequent legislation in that State creating such right of action as impairing the obligation of its charter contract ; however, the court does not intimate that the slightest assurance or guarantee of immunity against such liability in the future formed a term or obligation of the company's original charter, either "expressly" or "by an implication equally clear with express words."

We respectfully submit that these decisions are not applicable to the facts in this case, but that the language of the opinions clearly implies and supports the soundness of our position in the case at bar. The provisions of Section 17 of the incorporating act here in question *do expressly grant immunity* to the Louisiana Western Railroad Company from liability for injuries to its employees resulting in death, and this immunity was thus made one of the essential terms and considerations of the charter contract between the corporation created and the State of Louisiana creating it, and upon the terms of

which contract the parties had acted up to the legislation of 1884 which is relied upon as repealing the charter provision.

The suggestion of counsel in his brief (on page 10) that the provisions of Section 17 of the incorporating act were subject to the reserved police power of the State of Louisiana, could have no application in any event to the record in this case except upon the assumption that the amended act of 1884 creating the right of action for injuries resulting in death was a police regulation, and we submit that a slight examination of this act, with the measure and elements of recovery afforded by it, will negative the idea that the act contemplated anything more than compensation to certain designated relatives. The code provision as it existed at the time of Miller's death and which is invoked in this case, reads, with the latter portion which was added by the amended act of 1884 in italics, as follows:

" Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor

of the surviving father and mother, or either of them, for the space of one year from the death. *The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be*" (Record, pp. 141 and 142).

There is no provision by this amended statute for any right of action if there be not left surviving the deceased one or more of the relatives specially designated by the statute, so that if the object were a penalty to deter the wrong-doer in the interest of the public then the act would have this effect only in the case of a person being killed who left surviving him one or more of the relatives mentioned, and if he did not leave one of these relatives such person under this act could be killed with impunity. This, we suggest, forcefully demonstrates the weakness of the contention that the amended act of 1884 was intended by the legislature as an exercise of the police power of the State. But according to the testimony of Mr. Dart, given as an expert, the aim of this "Louisiana statute is to give pecuniary compensation for the loss sustained" (Record, p. 145). And according to his further testimony and the decisions of the Louisiana State courts cited by him the ele-

ments of damage under this statute as recognized by the courts of that State are as follows: (1) the damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness, etc.; (2) the loss by deprivation of the decedent's society and his aid and support, also the expense of his death and burial; and (3) the recovery for mental suffering of the survivors; while (4) vindictive or punitive damages are not permitted in any action for personal injuries against a corporation, etc. (Record, pp. 142 and 143). We submit that the elements of damage thus included and allowed by the Louisiana act are strictly compensatory and the exclusion of punitive damages as an element of recovery under that act is a circumstance forcefully refuting any contention that the act was intended as a police regulation. This immunity provision in the incorporating act could in no sense or degree be construed as restricting the State of Louisiana in the enactment and enforcement of ample and adequate penal laws against reprehensible homicide, and it

thus leaves intact for future legislatures a full and free exercise of the police power for the safety and protection of human life in that State. The fact that the Texas court took cognizance of this case and undertook to apply the Louisiana statute conferring this right of action for injuries resulting in death would seem to logically imply the conception of that court that the Louisiana act was not in the nature of a police regulation, for the statutory right of action in the State of Texas for injuries resulting in death awards damages only to certain designated relatives and *strictly as compensation*, and not "upon principles of public policy" (*I. and G. N. Ry. Co. v. McDonald*, 75 Texas, 46; *Hays v. Ky. Co.*, 46 Texas, 272; *Ry. Co. v. Moore*, 69 Texas, 157; *Ry. Co. v. Garcia*, 62 Tex., 292; *Ry. Co. v. Cowser*, 57 Tex., 293; *Ry. Co. v. Kindred*, 57 Tex., 491); and assuming that the Louisiana act did not award damages on the same principles and theory of the Texas act there would have been an insurmountable obstacle to the recognition and enforcement of the Louisiana act by the courts of Texas on principles of comity, according to the repeated decisions of those courts (*Ry. Co. v. Jackson*, 89 Texas, 107; *DeHarn v. Ry. Co.*, 86 Texas, 71; *Ry. Co. v. McCormick*,

71 Texas, 660). Indeed, if the object of the Louisiana Act of 1884 was in any sense penal in its nature, it would not be transitory and under the general law would not be enforceable in the courts of other states beyond the jurisdiction of the State of Louisiana (*Boston & Maine R. R. Co. v. Hurd*, 108 Fed. Rep., 116; *Higgins v. Central N. E. & W. Ry. Co.*, 155 Mass., 176; *Nelson v. Chesapeake & Ohio Ry. Co.*, 88 Va., 971).

THIRD POINT.

Article 2315 of the Civil Code of the State of Louisiana as amended by the act of 1884 created a right of action for injuries resulting in death and by its own language made it enforceable only for the period of one year from the death; this point was specially set up by plaintiffs in error, and was necessarily involved in the record before the State courts, and the judgment and decision of those courts in favor of plaintiffs below on the basis and authority of a right of action under this legislative act necessarily involved a failure to recognize and apply the act itself in all its pro-

visions, including the limitation of the right of action so created, and so give that full faith and credit to a public act of the State of Louisiana provided by the Constitution of the United States.

In our statement of the case we have given full references to the record, showing how this point was raised and necessarily involved in the decision of the State courts, but counsel for defendants in error in their brief in support of this motion appear to have overlooked the point and have made no reference to it in their brief. The State courts of Texas having referred to the pleadings of plaintiffs in error filed more than two years after the death of Miller and availed of these pleadings *alone* for a declaration upon the Louisiana statute, which the Court of Civil Appeals found indispensable as a basis in law for the judgment, yet disregarded a provision of the statute quite as essential by which any right of action herein must be deemed to have lapsed and terminated by limitation.

The transition from the case in plaintiffs' petition as fixed by its allegations alone, to the case made by a declaration upon the Louisiana statutory right of action in favor of the survivors mentioned for injuries resulting in death,

as claimed to be the effect of the filing of the answers of defendants more than two years after the death, involved such a departure from law to law as to amount to the institution of a new and different cause of action.

Ry. Co. v. Wyler, 158 U. S., 285-298.

Lumber Co. v. Water Works Co., 94 Tex., 456.

Whalen v. Gordon, 95 Fed. Rep., 314.

Anderson v. Wetter, 15 L. R. A. (N. S.), 1003.

Boston & Maine R. R. Co. v. Hurd, 108 Fed. Rep., 116.

Enc. of Pleading & Practice, Vol. 1, pp. 569, 570.

In the case of *Ry. Co. v. Wyler*, 158 U. S., 285, in which it was held that there had been a departure from fact to fact and from law to law by the amended pleadings as to constitute the assertion of a new and different cause of action, this court, through Mr. Justice WHITE, said at p. 296:

“The most common, if not the invariable test of departure in law as settled by the authorities referred to is a change from the assertion of a cause of action under the common or general law to a reliance upon a *statute* giving a particular or exceptional right.”

In the case at bar the right of action in favor of the survivors under the Louisiana statute obtained for a period of one year from the death and the right of action therefor lapsed and terminated without the commencement of an action upon it within that period, and could not thereafter exist as a right potential or enforceable anywhere.

In the case of *Boyd v. Clark*, 8 Fed. Rep., page 852, the court said:

“The true rule I conceive to be this, that where a statute gives a right of action unknown to the common law and either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue.”

The rule as here expressed has been constantly followed and re-asserted by this and other courts.

Whalen v. Gordon, 95 Fed. Rep., 319.
Theroux v. Ry. Co., 64 Fed. Rep., 84.
Munos v. So. Pac. Co., 51 Fed. Rep.,
 188.

The Harrisburg, 119 U. S., 199.
Davis v. Mills, 194 U. S., 451-457.

Mr. Justice HOLMES, writing the opinion of this Court, approved this rule in the case of *Davis v. Mills*, 194 U. S., 451, saying at page 454:

“ It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S., 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed

to the newly created liability so specifically as to warrant saying that it qualified the right."

Where a suit or action based on a statutory right of action is commenced or declared upon after the lapse of the period fixed by the provisions of the statute in which the right of action is required to be prosecuted, such limit being a part of the right itself thus created, and not merely a matter of remedy upon it, the statute itself no longer furnishes even a *prima facie* right of action as basis for recovery and the rule requiring the ordinary statute of limitation to be pleaded in order to avail as a defence is not called for and does not apply.

A. & E. Enc. of Law (2nd Ed.), Vol. 19, pp. 150 & 151, and cases there cited.

Enc. of Pleading & Practice, Vol. 13, pp. 186 & 187, and Note 1.

Cyc. of Law & Procedure, Vol. 25, pp. 1020 & 1403, and cases there cited.

The State courts having considered and adopted the Louisiana statute as the indispensable basis for the judgment and this *solely* through the medium of the defendant's pleading which was filed more than two years after the death, on

the theory that such pleading when so filed became available as a declaration in behalf of the plaintiffs below, could not ignore the provision of that same act fixing and limiting the period of the right created without involving *necessarily* a refusal to give full faith and credit to the act.

Des Moines Navigation Co. v. Iowa Homestead Company, 123 U. S., 552.

Land & Water Co. v. San Jose Ranch Co., 189 U. S., 179-181.

Philadelphia Fire Association v. New York, 119 U. S., 110-129.

FOURTH POINT.

The fact that the judgment complained of was rendered jointly against the Texas and New Orleans Railroad Company and the Louisiana Western Railway Company on the theory of partnership or joint tortfeasors, as suggested in brief of defendants in error (p. 14), does not eliminate the federal questions nor affect their controlling importance in the case at bar.

Upon the issue of a partnership relation between the Texas and New Orleans Railroad Company and the Louisiana Western Railroad Com-

pany, in the operation of trains over their respective railroads, the proof on the trial was that the Texas and New Orleans Railroad Company, a Texas corporation, owned the lines of railroad from Houston, Texas, to the Sabine River, which is the boundary between Louisiana and Texas, and that the Louisiana Western Railroad Company, a Louisiana corporation, owned and operated a railroad line extending in Louisiana from the Sabine River on the west to LaFayette, in Louisiana; that these railroad lines were part of a continuous general line of railroad extending from San Francisco, California, to New Orleans, Louisiana, known as the "Sunset Route," and were a part of the Southern Pacific System; that for mutual convenience in making through runs over their respective lines an arrangement existed between the two companies whereby each in turn, for purposes of the operation of its own line, utilized and paid for the services of the same train crews according to the extent of the service performed for them and on their respective lines, and each paid for the use of the other's locomotives and for the ordinary repair thereof to the extent of the mileage operated on its respective line, each paying the expense of the operation of passenger service over the lines

according to the mileage of transportation over their lines respectively, there being *no* division of profits or losses upon the business transported by them, or either of them. The proof showed further without dispute that Miller and Gross† at the time of the accident and injury were performing service in the State of Louisiana on the line of the Louisiana Western Railroad Company, and not on any line of the Texas & New Orleans Railroad, and at the time were responsible to the officers of the Louisiana Company, and that the alleged negligence which brought about the injury and death involved acts and omissions on the part of the officers and employes of the Louisiana Company located in Louisiana and employed by the Louisiana Company and who were not employes of or responsible to the Texas company, and that Miller and Gross entered and remained in the service with the full knowledge and understanding that while operating the train on the Louisiana line they were responsible to its officials and would receive their pay from the

†Gross was plaintiffs' intestate in companion case No. 832, also submitted on motion to dismiss or affirm. The same procedure was taken and followed in both the Gross and Miller cases, and they involve practically the same questions.

Louisiana company, and not from the Texas company (Record, pp. 87, 88, and 93 to 129).

Plaintiffs in error, contended that this arrangement and method of business did not constitute in law a partnership or other relation as would render the Texas and New Orleans Railroad Company liable for the injury and death of Miller because of the derailment of the locomotive while he was operating it entirely on the line and in the service and interest of the Louisiana Western Railroad Company and for which particular service at the time of his injury with his own knowledge and volition he was directly responsible to the Louisiana Western Railroad Company and in the latter's pay, nor could there be any liability on the part of the Texas and New Orleans Railroad Company as a tort feisor under the doctrine of *respondeat superior*. The trial Judge overruled this contention, finding the existence of a partnership and fixing joint liability, and rendered judgment against the two companies jointly (Record, pp. 23-27).

The Court of Civil Appeals of Texas in its opinion, referring to this contention, said:

" So far as the liability of the defendants is concerned, it can make no difference

whether they establish a 'partnership' in the legal sense of the term or not. For the facts found are such as make them jointly and severally liable for injuries inflicted by each other upon an employee of both while engaged in their common service " (Record, p. 161).

The relation and arrangement existing between the two railroad companies, according to the undisputed facts, were very similar to the facts in the case of *Peterson v. Chicago, R. I. & P. Ry. Co.* (205 U. S., 364, 390), before this Court on writ of error from the Supreme Court of Texas. In that case the question of liability on the ground of partnership was not involved, but the contention made was that the conductor and other train operatives who were in the employment both of the Pacific and of the Gulf Company, performing service for each and receiving compensation from each, while on their respective lines, were, while in the State of Texas beyond the lines of the Pacific Company representatives. The proposition was denied by this court, holding that the conductor while working on his continuous run and after having entered Texas and passed beyond the line of the Pacific was no

longer "an agent of the Pacific Company doing the business of that company in Texas." For as strong reason, we submit, that under the undisputed facts in this case the engineer at the time of operating the locomotive and drawing a train on the line of the Louisiana Western Railroad Company in the State of Louisiana, beyond the railroad of the Texas & New Orleans Railroad Co., and at a time when he was receiving his compensation for such service from the Louisiana Western Railroad Company and was responsible to its officers, was not engaged in doing the business or service of the Texas & New Orleans Railroad Co. so as to render this company in any sense liable for the alleged negligence of the individual employes of the Louisiana Western Railroad Company under the doctrine of *respondeat superior*.

However, if it were true that the Texas and New Orleans Railroad Company could be held jointly liable on the theory of a partnership for an individual act or omission of its co-defendant, such liability would have to be predicated on the fact that primarily the co-partner was legally liable under the laws of Louisiana; but if the immunity provision of the incorporating act afforded a complete defense to the Louisiana

Western Railroad Company so that the primary liability could not attach to this company, then there could be *no* predicate for liability of the Texas and New Orleans Railroad Company; and in any event the federal questions involved in this record as to the Louisiana Western Railroad Company and its surety cannot be eliminated or removed as controlling points in the record of this case by reason of the joint recovery, whether the judgment against the Texas and New Orleans Company was warranted under the general law or not. And much less could the question or finding of a partnership or other relation between the two companies, or the power of the Texas courts to render joint or several judgments against tort-feasors, affect the standing of either of the companies before this court on the point involved in this record as a federal question,—that the right of action, if any, against them, based on the amended act of Louisiana, had lapsed and expired before the commencement of the action, and *hence* the decision by ignoring an essential provision of *this* act failed to give *it* full faith and credit.

FIFTH POINT.

The federal questions involved and decided adversely to plaintiffs in error are not frivolous but are of serious and controlling importance, and are not urged for delay but in good faith and with due respect for the rules and practice of this Court.

We insist that the record does not reveal any matter or circumstance to justify the claim that any of the federal questions raised and involved are frivolous in their nature or that they are being urged for delay.

The State of Louisiana, through its General Assembly, has created and furnished both the statutory right of action sought to be *enforced* and the private corporation which is sought to be *held* liable in the Texas courts for an occurrence entirely within the territory and subject to the jurisprudence of the State of Louisiana. The Texas court in taking cognizance of this action as a transitory one has depended on the statute laws of Louisiana not only for the right of action but as well for the corporate party defendant; and yet, while resorting to the incorporating act of the Louisiana Western Railroad

Company for the purpose of holding it as a tangible entity subject to its decree, the Texas court has ignored and rejected an express provision of this same act which the Legislative Assembly of Louisiana (for reasons deemed sufficient to *itself*), saw fit to embody as one of the considerations of mutual right and obligation composing the finished act when formulated and adopted as an entirety. Again, the Texas courts while resorting to the pleadings filed by defendants below for a declaration and a right of action predicated on the Louisiana statute as a basis for its judgment, yet have ignored the provision of that statute which fixes and limits the life and duration of the right of action so created and which, according to the law, had *expired*. Thus, the Texas courts, while undertaking to administer the laws of Louisiana in a spirit of comity, have rendered judgment against a corporate citizen of that State for occurrences therein and based upon a statutory right of action of Louisiana without giving full faith and credit to either the act creating the corporation or the act giving such right of action, and thus involving necessarily and concurrently a two-fold infringement of Section 1, Article IV. of the United States Constitution.

The contention that the provision in this incorporating act constitutes a substantial and valid obligation within the meaning of the contract clause of the United States Constitution, we submit involves a serious and vital matter and ought not, as suggested by opposing counsel, to be swept aside on motion or determined without full consideration upon a regular submission and argument. The Court of Civil Appeals in overruling this point seeks to justify it by suggesting, among other reasons, the course that this Court would probably take "if a case arising under the Employers' Liability Act should come before it involving the question of immunity from liability claimed here by defendant under its charter," and says: "That great and pure tribunal with one breath would blow it away as though it were a thistle down; and yet an act of Congress can no more impair the obligation of a contract than can the act of a State legislature" (Record, pp. 160 and 161). In response to this suggestion in the opinion of the Court of Civil Appeals we urged in our Motion for Rehearing before that Court (Record, pp. 167 and 168), that such a ruling if made by this Court in a case involving the Employers' Liability Act when conflicting with this charter

provision would be clearly distinguishable on the essential fact that the Employers' Liability Act passed by Congress was enacted by virtue of the power expressly reserved in Congress to regulate commerce "among the several states." (Article I, Section VIII., Sub-division 3). So that the Louisiana Legislature probably had no power to make a contract indemnifying its corporations against legislation by Congress on a subject which theretofore had been relinquished by the State and rested exclusively within the province of the federal government.

The question before the Court of Civil Appeals and decided against the plaintiffs-in-error in this connection was not whether full faith and credit should be given to a legislative act of the State which had made a purported contract to indemnify its citizens against the results of legislation *by the United States Congress* on a subject placed by the Constitution *in the federal government* and *beyond* the province of the State. But the question distinctly was whether an incorporating act of the State of Louisiana, granting immunity against the liability mentioned, should receive full faith and recognition in its entirety as an act of that State and be upheld as creating a contract the obligation of which could not be impaired by

subsequent legislation of the *contracting* State *itself*, acting strictly within the scope of its own legislative powers and upon subjects within its province as a sovereign State ; this is one of the questions involved in the record and presented on this appeal.

Counsel for defendants in error insisted before the Court of Civil Appeals in their brief before that court (pp. 41 to 45) and again in their brief supporting their motion before this Court (p. 9), that the immunity provision of the incorporating act was void *ab initio* and was not an obligation within the contract provision of the federal constitution because in conflict with the Fourteenth Amendment of the United States Constitution providing for the "equal protection of the laws," and thus defendants in error themselves have raised a federal question in this record by way of rebuttal (*Land & Water Co. v. San Jose Ranch Co.*, 189 U. S., 179-181) and have thereby estopped themselves from now insisting either that no federal questions are involved or that those raised are frivolous.

However, it is not the purpose of this brief to undertake a full discussion of the merits involved on this appeal, or to reply in detail to the contentions made and the views expressed by

opposing counsel, but we merely refer to these matters as indicating that federal questions have been specially set up and were involved and were seriously considered and decided by the State courts against the contentions of plaintiffs in error, and that the points so involved merit full consideration by this Court after regular submission.

Firmly believing that the record in this cause involves substantial points decided adversely to plaintiffs in error, for the review of which this Court has jurisdiction, and that these points are of such importance as to justify a full review of the judgment and proceedings of the Court below, and disavowing any purpose of delay, we respectfully ask that the motion of defendants in error to dismiss the writ of error or affirm the judgment be denied.

MAXWELL EVARTS,

H. M. GARWOOD,

A. L. JACKSON,

Of Counsel for Plaintiffs in Error.

Same Appellants against Felix and Theresa Gross, No. 832,
is a Companion Case, and the Two are Asked to be Con-
sidered Together.

No. 831

Office Supreme Court, U. S.
FILED.

MAR 20 1911

JAMES H. MCKENNEY,
CLERK.

In the

Supreme Court of the United States

October Term, 1910.

TEXAS & NEW ORLEANS RAILROAD COMPANY AND
LOUISIANA WESTERN RAILROAD COMPANY AND
THEIR SURETY, THE UNITED STATES FIDELITY
& GUARANTY COMPANY, *Plaintiffs in Error,*

VERSUS

FANNIE MILLER, G. W. MILLER, WILLIAM D. MILL-
ER, DORRANCE H. MILLER AND FANNIE MILL-
ER SUING AS NEXT FRIEND, ETC., *Defendants*
in Error.

In Error to the Court of Civil Appeals for the Fourth
Supreme Judicial District of the State of Texas

BRIEF AND ARGUMENT

On Motions to Dismiss Writ of Error or to Affirm Judg-
ment.

— BY —

J. W. PARKER,

Attorney.



In the
Supreme Court of the United States

October Term, 1910.

TEXAS & NEW ORLEANS RAILROAD COMPANY AND
LOUISIANA WESTERN RAILROAD COMPANY AND
THEIR SURETY, THE UNITED STATES FIDELITY
& GUARANTY COMPANY, *Plaintiffs in Error*,

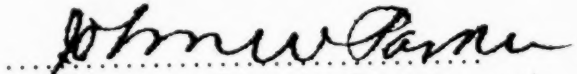
versus { No. 831.

FANNIE MILLER, G. W. MILLER, WILLIAM D. MILLER,
DORRANCE H. MILLER AND FANNIE MILLER
SUING AS NEXT FRIEND, ETC., *Defendants in Error*.

In Error to the Court of Civil Appeals for the Fourth
Supreme Judicial District of the State of Texas.

Come now the defendants in error herein, by their counsel appearing in that behalf, and move the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ was allowed is the judgment or decree of the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, being the highest court of law or equity of the State in which a decision could be had in said cause.

And the said defendants in error, by counsel as aforesaid, also move the court to affirm the said judgment or decree, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was sued out for delay only.

A handwritten signature in cursive script, appearing to read "John W. Parson". The signature is written in dark ink and is positioned above a dotted line.

.....
*Counsel for Defendants in Error for the purposes of
these motions.*

In the
Supreme Court of the United States
October Term, 1910.

TEXAS & NEW ORLEANS RAILROAD COMPANY AND
LOUISIANA WESTERN RAILROAD COMPANY AND
THEIR SURETY, THE UNITED STATES FIDELITY
& GUARANTY COMPANY, *Plaintiffs in Error*,
versus } No. 831.

FANNIE MILLER, G. W. MILLER, WILLIAM D. MILL-
ER, DORRANCE H. MILLER AND FANNIE MILL-
ER SUING AS NEXT FRIEND, ETC., *Defendants*
in Error.

In Error to the Court of Civil Appeals for the Fourth
Supreme Judicial District of the State of Texas.

**BRIEF AND ARGUMENT ON MOTIONS TO DISMISS
WRIT OF ERROR OR TO AFFIRM JUDGMENT.**

This was a suit by defendants in error (plaintiffs in the court below) against the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, plaintiffs in error (defendants in the court below), for damages for the death of William T. Miller, husband and father of the defendants in error respectively, as a result of injuries suffered by him by the derailment of a locomotive which he was propelling as an employe of plaintiffs in error, due to their negligence, at a point on

the line of the Louisiana Western Railway, in Louisiana, on June 1st, 1905; it being alleged that the two companies were jointly engaged in operating their respective lines as a continuous route between Houston, in the State of Texas, and Lafayette, in the State of Louisiana, and were partners in the business, sharing in the profits and losses thereof. (Rec., 1-6.)

The following is the article of the Revised Civil Code of Louisiana, as amended in 1884, conferring a right of action for injuries resulting in death, and in force at the time of the injury and death of Miller:

Article 2315. Obligation to repair damage caused by wrongful acts; survivorship of action. "Every
 "act whatever of man that causes damage to another
 "obligates him by whose fault it happened to repair
 "it; the right of this action shall survive in case of
 "death in favor of the minor children or widow of
 "the deceased or either of them, and in default of
 "these, in favor of the surviving father and mother
 "or either of them, for the space of one year from
 "the death. The survivors above mentioned may
 "also recover the damages sustained by them by the
 "death of the parent or child, or husband or wife,
 "as the case may be." (Rec., 141, 142.)

The plaintiffs in error defended on the ground that the charter of the Louisiana Western Railway Company, granted by the Louisiana Legislature in 1878, contained a clause exempting the company from liability for injury or death of its employes due to its negligence or carelessness. The following is the clause:

"Sec. 17. Be it further enacted, etc.: That said
 "company, its officers or employes, shall not be liable
 "in any sum whatsoever of damages or costs in any
 "action brought by any party against it, or them, or
 "any or either of them, for any injury to the person,
 "or loss of life, or injury to, or detention or loss of
 "baggage, caused by any accident, or alleged care-

“lessness or negligence on the part of said company, its officers or employes, and sustained by any person while riding or being transported, free of charge, upon its railroad, or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employe of said company, or as an employe of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employes shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employes, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life.” (Rec., 137, 138.)

The court refused to give to the provision the effect contended for by plaintiffs in error, and finding that both defendants on said date, and for a long time prior thereto, were jointly engaged in the business of operating the said railways as one continuous line from Houston, in Texas, to Lafayette, in Louisiana, and were partners in such business, sharing in the profits and losses thereof, rendered judgment for defendants in error against both companies jointly. (Rec., 24-26.)

Plaintiffs in error appealed and assigned the following error relative to the point:

“That the court erred, to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company,

"in its judgment and decree against them, and in the
 "conclusions of fact and law upon which said judgment is based, in this: That under and by virtue
 "of Section 17 of the act of the Legislature of Louisiana in 1878, incorporating the Louisiana Western
 "Railroad Company, the said corporation was and is
 "exempted from legal liability for the alleged injuries resulting in the death of William Miller, and
 "such immunity and exemption from liability was a
 "matter of contract between the State of Louisiana
 "and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employe, and the act of
 "the legislature of the State of Louisiana of the year
 "1884, amending Article 2315 of the Civil Code of
 "said State so as to give, or attempt to give and create, the right of action asserted by plaintiffs in this
 "cause, would have and did have the effect, if enforceable, of impairing the obligation of such contract,
 "and thus would be and was violative of the provisions of the Constitution of the State of Louisiana
 "and of the State of Texas and of the United States
 "of America, and especially of Section 10 of Art. 1
 "of the Constitution of the United States of America." (Rec., 64, 65.)

The Court of Civil Appeals, to which the case was taken by appeal, disposed of the point in the following manner:

"The fact that the act incorporating the Louisiana
 "Western Railroad Company contains a provision
 "exempting that company from liability for injuries
 "such as were inflicted on the deceased Miller, and
 "on which this suit is based, offers no barrier to the
 "courts of this State entertaining jurisdiction of
 "this case, especially as to the Texas & New Orleans
 "Railroad Company. It is a fundamental principle
 "of law that one legislature cannot deprive another
 "of the right, or restrain it in its duty, to legislate
 "in the interest of the general public. No such surrender of legislative power can be tolerated unless
 "authorized by the Constitution. It is the rights of
 "the general public, not of private parties against
 "the interest of the public, that must be conserved

“by legislation. The provision referred to in the
 “charter of the La. W. R’y Company has never been
 “invoked in the jurisdiction of its enactment, to
 “shield it from its liability for injuries such as are
 “shown to have been inflicted in the case before us;
 “nor, do we think, ever can be successfully. If force
 “and effect should be given it, the consequence would
 “be to prevent the legislature of a sovereign State
 “from ever passing a uniform law holding railroads
 “liable for wrongs such as are complained of in this
 “case. The people, voicing the fundamental law of
 “the realm, only can do this. The act of no one leg-
 “islature can have the force and effect of the Con-
 “stitution, which, in uttering the will of the people
 “to legislatures, says, ‘Thus far shalt thou go, but
 “‘no further.’ * * * ” (Rec., 156, 157.)

“As to the provision in the legislative charter of
 “the Louisiana Western Railway Company relieving
 “the company from liability for injuries resulting in
 “the death of its train operatives, we will remark
 “that such provision was not within the purview of
 “Art. 10, Sec. 1, of the Constitution of the United
 “States; such a contract between the railroad com-
 “pany and the State of Louisiana as the State was
 “inhibited from impairing an obligation. As before
 “intimated, the power of the State to exercise its
 “general legislative functions could not be traded
 “or bartered away in any such manner. It is a gen-
 “eral principle that the legislature cannot diminish
 “the power of its successors by irrevocable legisla-
 “tion; for if it could, one legislature might so fetter
 “its successors as to destroy the functions and pow-
 “ers of representative government. Railroad com-
 “panies are public service corporations chartered,
 “maintained and run in the interest of the public,
 “and cannot break or be let loose from the power or
 “control of the public without becoming the masters
 “instead of the servants of the people. ‘Where the
 “‘wicked rule, the people mourn.’ And groans of
 “oppression come from the people, in tones louder
 “than whispers, in those States where railroads dom-
 “inate. It is not left to conjecture what the ruling
 “of the Supreme Court of the United States would
 “be if a case arising under the Employers’ Liability
 “Act should come before it involving the question

“of immunity from liability claimed here by the defendant under its charter. The great and pure tribunal, with one breath, would blow it away as though it were but thistle down; and yet, an act of Congress can no more impair the obligation of a contract than can the act of a State legislature. The safety of passengers and expeditious carriage of freight depend, in a large manner, upon the preservation of the lives of the train operatives; and no better way has ever been devised to secure these ends than to hold railroad companies liable for the death of its train operatives resulting from the negligence of such companies. So an act creating such liability, though the damages are given to the members of the deceased’s family, may be regarded, in one sense of the term, an exercise of the police power of the State—a power of which it cannot be divested by the legislature. If the Constitution itself should endeavor to inhibit the exercise of such power, it would simply result, if heeded, in the destruction of the principal functions of government. So we take it that if the provision in the charter ever had any force, it was, in effect, repealed by the act of 1884, giving certain persons a right of action for the death of a relative, caused by negligence.” (Rec., 160, 161.)

Plaintiffs in error moved for a rehearing in the Court of Civil Appeals, on the ground that the court erred in not holding that the act of 1884, amending Article 2315 of the Revised Civil Code of Louisiana, “*if sought to be applied to the appellants in this case (plaintiffs in error) would impair the obligation of a contract, and would violate the State and Federal Constitutions*”; and on the additional ground, which was then for the first time advanced, that the court, in giving judgment against plaintiffs in error, *denied full faith and credit to the act incorporating the Louisiana Western Railroad Company, and in so doing violated plaintiffs in error’s “rights, privileges and immunities under the Constitution and statutes of the United States.”* (Rec., 167.)

It is submitted that if what is said in plaintiffs in error's motion for rehearing respecting the act of 1884 being an impairment of the obligation of a contract, is sufficient to keep that question up for consideration by this court, that the claim that the action of the courts of Texas in refusing effect to the charter provision was violative of the "Full Faith and Credit Clause" of the United States Constitution, cannot be considered, because not presented in time. Nor does it appear to have been ruled upon by the Court of Civil Appeals.

However, if the question as to impairment of a contract obligation is before the court, it will make no difference if the court shall treat the other one as before it, so far as defendants in error are concerned, because, if the provision in the charter was invalid from the beginning, denying it effect would violate no provision of the Constitution; or if it was valid at the beginning, and the act of 1884 annulled it, denying it effect would not either impair the obligation of a contract or infringe the Full Faith and Credit Clause.

Was the provision originally valid?

Defendants in error submit that it was not, for the reason that the provision itself offends against the "equal protection of the laws" clause of the Fourteenth Amendment, and probably against Sec. 2 of the Fourth Article.

The court must judicially know that there were numerous persons and corporations in Louisiana at the time the special act was passed, who were liable under the law for injuries caused by "negligence and carelessness" under circumstances where the Louisiana Western Railroad Company would have been exempt if the provision in the charter was valid. Can it be extending the equal protection of the laws for a State to exempt one or more

of its citizens from liability for acts of negligence, and at the same time impose liability upon the rest of its citizens for the same acts of negligence? Suppose Louisiana had exempted by the act a particular person from liability for his negligence, while all others were liable for their negligence, could there be any difference of opinion that such a discrimination would be a denial to the citizens remaining liable of the equal protection of the laws?

It is not disputed that the Act of 1884 amending Article 2315 of the Revised Civil Code of Louisiana annulled the exemption, unless protected by the provision of the Constitution against impairment of the obligation of contracts. *Conceding the exemption was originally valid, the question remained, could the legislature repeal or annul the same?*

Defendants in error affirm that it could.

The charter provision affected a subject falling clearly within the police power of the State. This is believed to be too plain for argument.

“The constitutional prohibition upon State laws
 “impairing the obligation of contracts does not re-
 “strict the power of the State to protect the public
 “health, the public morals, or the public safety, as
 “the one or the other may be involved in the execu-
 “tion of such contracts. Rights and privileges aris-
 “ing from contracts with a State are subject to reg-
 “ulations for the protection of the public health, the
 “public morals, and the public safety, in the same
 “sense and to the same extent as are all contracts
 “and all property, whether owned by natural persons
 “or corporations. A State legislature cannot, by
 “any contract, divest itself of the power to provide
 “for the protection of the lives, health and property
 “of the citizens, and the preservation of good order
 “and the public morals. They belong emphatically
 “to that class of subjects which demand the applica-

“tion of the maxim, *salus populi suprema lex*; and
 “they are to be attained and provided for by such
 “appropriate means as the legislative discretion may
 “advise. That discretion can no more be bargained
 “away than the power itself.”

The case of Penn. R. Co. v. Miller, 132 U. S., 75, is believed to be an appropriate authority in support of defendants in error's contention.

Miller sued the railroad company for damages to property, and the latter defendant, on the ground “that it had a right to do what it had done without liability to plaintiff, by virtue of its charter,” contained in certain acts of the legislature of Pennsylvania, passed in 1846 and 1857. The court will pardon a somewhat lengthy extract from the opinion.

Mr. Justice Blatchford states the question to be decided as follows:

“The Federal question involved is whether the acts
 “of 1846 and 1857 constituted a contract between the
 “State and the defendant, relieving the defendant
 “from liability in this suit, and whether such con-
 “tract was of such a character that its obligation
 “could not be impaired by subsequent legislation by
 “the State.”

In the course of the opinion he says:

“By the Constitution of Pennsylvania of 1873,
 “which took effect January 1st, 1874, it was provid-
 “ed as follows, by section 8 of Article XVI: ‘Muni-
 “cipal and other corporations and individuals in-
 “vested with the privilege of taking private property
 “for public use shall make just compensation for
 “property taken, injured or destroyed, by the con-
 “struction or enlargement of their works, highways
 “or improvements, which compensation shall be paid
 “or secured before such taking, injury or destruc-
 “tion. * * *

“There was no such contract between the State
 “and the defendant, prior to the Constitution of 1873,

"as prevented the subjection of the defendant by
 "that Constitution to the liability for consequential
 "damages arising from its construction of this ele-
 "vated road in 1880 and 1881. Prior to the Constitu-
 "tion of 1873, and under the constitutional provis-
 "ions existing in Pennsylvania before that time, the
 "Supreme Court of that State had uniformly held
 "that a corporation with such provisions in its char-
 "ter as those contained in the charter of the defend-
 "ant, was liable, in exercising the right of eminent
 "domain, to compensate only for property actually
 "taken, and not for a depreciation of adjacent prop-
 "erty. The eighth section of Article XVI of the
 "Constitution of 1873 was adopted in view of those
 "decisions, and for the purpose of remedying the
 "injury to individual citizens caused by the non-li-
 "ability of corporations for such consequential dam-
 "ages. Although it may have been the law in respect
 "to the defendant, prior to the Constitution of 1873,
 "that under its charter and the statutes in regard to
 "it, it was not liable for such consequential damages,
 "yet there was no contract in that charter, or in any
 "statute in regard to the defendant, prior to the
 "Constitution of 1873, that it should always be ex-
 "empt from such liability, or that the State, by a
 "new constitutional provision, or the legislature,
 "should not have power to impose such liability upon
 "it in cases which should arise after the exercise of
 "such power. But the defendant took its original
 "charter subject to the general law of the State, and
 "to such changes as might be made in such general
 "law, and subject to future constitutional provisions
 "or future general legislation, since there was no
 "prior contract with the defendant, exempting it
 "from liability to such future general legislation, in
 "respect of the subject-matter involved. * * *

"The provision contained in the Constitution of
 "1873 was merely a restraint upon the future exer-
 "cise by the defendant of the right of eminent do-
 "main imparted to it by the State. By its terms
 "it imposes a restraint only upon corporations and
 "individuals invested with the privilege of taking
 "private property for public use, and extends the
 "right to compensation, previously existing, for
 "property taken, to compensation for property in-

"jured or destroyed by the construction or enlarge-
 "ment of works, highways or improvements, made or
 "constructed by such corporations or individuals.
 "Such provision is eminently just, and is intended
 "for the protection of the citizen, the value of whose
 "property may be as effectually destroyed as if it
 "were taken and occupied. *The imposition of such*
 "*a liability is of the same purport as the imposition*
 "*of a liability for damages for injuries causing*
 "*death, which result from negligence, upon corpora-*
 "*tions which had not been previously subjected in*
 "*their charters to such liability.* (Italics counsel's.)
 "Boston C. & M. R. Co. v. State, 32 N. H., 15; South-
 "western R. Co. v. Paulk, 24 Ga., 356; Duncan v.
 "Pennsylvania R. Co., 94 Pa., 435; Georgia R. & Bkg.
 "Co. v. Smith, 128 U. S., 174 (32:377); Cooley Const.
 "Lim. (4th ed.), ecs. 581, 724; S1 Hare Am. Const.
 "Law, 421.

"Nor will the exemption claimed from future gen-
 "eral legislation, either by a constitutional provision
 "or by an act of the legislature, be admitted to exist,
 "unless it is expressly given, or unless it follows by
 "an implication equally clear with express words.
 "*In present case, the statutory provisions existing*
 "*prior to the Constitution of 1873, in favor of the*
 "*defendant, cannot be properly interpreted so as to*
 "*hold that the State parted with its prerogative of*
 "*imposing the liability in question, in regard to fu-*
 "*ture transactions.* (Italics counsel's.) Providence
 "Bank v. Billings, 29 U. S., 4 Pet., 514 (7:939);
 "Charles River Bridge v. Warren Bridge, 36 U. S.,
 "11 Pet., 420 (9:773); Christ Church v. Philadelphia
 "County, 65 U. S., 24; How., 300 (16:602); Gilman
 "v. Sheboygan, 67 U. S., 2 Black, 510 (17:305); Tuck-
 "er v. Ferguson, 89 U. S., 22 Wall., 527 (22:805);
 "Northwestern Fertilizing Co. v. Hyde Park, 97 U.
 "S., 659 (24:1036); Newman v. Mahoning County,
 "100 U. S., 548, 561 (25:710, 712); 2 Hare, Am. Const.
 "Law, 661, 663, 664."

It cannot be pretended there is anything in the charter
 provision in question which by express terms makes it
 perpetual in its operation, or exempts it from future gen-
 eral legislation.

The exemption was in no sense a property right, nor one for which a consideration could have passed from the company. At most it was but a privilege, and being such, was revocable at the will of the legislature.

Cooley's Const. Lim., p. 338.

The provision in a charter of an insurance company which limited a suit on the policy to the county where the company was located, was held to pertain to the remedy, and to be subject to change by a general law upon the subject.

Saunders v. Hillsborough, 44 N. H., 238.

It is inconceivable that the Constitution of the United States could be successfully invoked as a shield to wrongdoing. Certainly no man or corporation is entitled to perpetual exemption from the consequences of his wrong doing, or negligent acts; and where the State has so far forgotten its duty as to grant such exemption, the beneficiary should not be heard to complain when the State, again mindful of its obligation to the public, seeks to withdraw it. If the Louisiana Company does not wish to be held responsible, like all other citizens, for its negligence, let it not be guilty of negligence. It certainly can claim no irrevocable grant to be negligent or careless. It is a significant fact that it does not appear the exemption has ever before been claimed by the company.

But if the court shall take the view that the charter provision is a valid grant in perpetuity, and relieves the Louisiana Western Railway Company from liability in this case, yet it cannot be held to afford any protection to the ~~Texas & New Orleans~~ New Orleans Railroad Company, because that company is not a party to the grant. Of course, it is fundamental law that only parties to a contract, or their privies, can claim the benefits of the contract.

It is equally settled law that joint *tortfeasors* may be sued jointly or separately, and it must be clear that an employe injured by the negligence of two or more masters who live in different States can sue either in the State where he may reside, which, of course, would entitle him to judgment against that one alone.

Defendants in error could have sued the Texas & New Orleans R. R. Company alone, and had judgment against it alone, and, of course, joining the Louisiana Company in the suit could not affect their right to have judgment against the Texas Company, even though it should be found they were not entitled to judgment against the Louisiana Company.

Counsel does not refer to the issues of fact, because he understands this court will not review them.

Waters-Pierce Oil Co. v. Texas, 212 U. S., 86; L. Ed., 424, 425.

S. L. I. M. & S. R. Co. v. Taylor, 210 U. S., 281; 52 L. Ed., 1066.

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S., 1; 51 L. Ed., 688.

The same appellants *versus* Felix and Theresa Gross, No. 832, is a companion case to this, William T. Miller, deceased, herein, being the engineer, and Corley Gross, deceased, being the fireman, and both killed in the same wreck, and the same Federal questions being presented in each, counsel request that the two records be considered together.

Respectfully submitted,



 Attorney for Defendants in Error.

TEXAS & NEW ORLEANS RAILROAD COMPANY *v.*
MILLER.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 831. Submitted April 17, 1911.—Decided May 15, 1911.

The protection of charter rights by the contract clause of the Federal Constitution is subject to the rule that a legislature cannot bargain away the police power, or withdraw from its successors the power to guard the public safety, health and morals.

A provision in its charter exempting a railroad company from liability for death of employés, even if caused by its own negligence, does not

221 U. S.

Syllabus.

amount to an irrevocable contract within the protection of the Federal Constitution, but is as much subject to future legislative action as though embodied in a separate statute.

Provisions in a corporate charter which are beyond the power of the legislature to grant are not within the protection of the contract clause of the Federal Constitution.

Where there is no allegation or proof that the highest court of a State has construed a statute of that State, it becomes the duty of the courts of another State, which do not take judicial knowledge of decisions of other States, to construe the statute and its effect upon prior statutes according to their independent judgment. *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36.

The decision of a state court construing a statute of another State under such circumstances is not subject to review by this court if no Federal right is involved. *Eastern Building & Loan Assn. v. Ebaugh*, 185 U. S. 114.

This court will not disturb the decision of the courts of Texas that the act of Louisiana of 1884, giving a right of action to relatives of persons killed by negligence of another, repealed the provisions in the charter of a railroad company granted in 1878 exempting it from liability for a person killed by its negligence; and the act of 1884 is not unconstitutional as impairing any contract obligation in such charter.

An omission in the complaint can be cured by an allegation in the answer. *United States v. Morris*, 10 Wheat. 246.

Where an action is commenced in the courts of one State, based on a right given by the statute of another State provided it be commenced within a specified period, which has not expired, the omission of the plaintiff to plead the statute may be cured by the defendant pleading the statute, although the answer may not be filed until after the period of limitation has expired; and the decision of the state court to that effect does not violate the full faith and credit clause of the Federal Constitution, and involves no Federal question.

128 S. W. Rep. 1165, affirmed.

THE facts, which involve the construction of certain acts of Louisiana, and their constitutionality under the contract clause of the Constitution and whether the courts of Texas, in construing them, had failed to give them full faith and credit as required by the Constitution, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. H. M. Garwood* and *Mr. A. L. Jackson* were on the brief, for plaintiffs in error:

The immunity provision in § 17 of the incorporating act of the Louisiana Western Railroad Company was specially set up by plaintiffs in error as a valid public act of the State of Louisiana, and the decisions of the state courts of Texas were adverse to this contention and necessarily failed to give full faith and credit to that portion of a public act, within the meaning of the Constitution of the United States.

The refusal to consider a controlling Federal question is equivalent to a decision against the Federal right involved. *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552.

The state court by its decision necessarily adjudicated the defense which was claimed under the state act. *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 90; *Wabash Railroad v. Adelbert College*, 208 U. S. 38, 44; *A., T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55; *Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 179; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 139; *Murdock v. Memphis*, 20 Wall. 590; *Mallett v. North Carolina*, 181 U. S. 588.

The immunity provision contained in § 17 was a contract within the meaning of the impairment clause of the Constitution. *Pennsylvania Railroad Co. v. Miller*, 132 U. S. 75; *Southwestern Railroad Co. v. Paulk*, 24 Georgia, 356; *Duncan v. Pennsylvania Railroad Co.*, 94 Pa. St. 443.

The fact that the Texas court took cognizance of this case and undertook to apply the Louisiana statute conferring this right of action for injuries resulting in death implies the conception of that court that the Louisiana act was not in the nature of a police regulation, for the statutory right of action in Texas for injuries resulting in death awards damages only to certain designated relatives and strictly as compensation, and not upon principles

221 U. S.

Argument for Plaintiffs in Error.

of public policy. *I. & G. N. Ry. Co. v. McDonald*, 75 Texas, 46; *Hays v. Railway Co.*, 46 Texas, 272; *Railway Co. v. Moore*, 69 Texas, 157; *Railway Co. v. Garcia*, 62 Texas, 292; *Railway Co. v. Cowser*, 57 Texas, 293; *Railway Co. v. Kindred*, 57 Texas, 491. Assuming that the Louisiana act did not award damages on the same principles and theory of the Texas act there would have been an insurmountable obstacle to the recognition and enforcement of the Louisiana act by the courts of Texas on principles of comity. *Railway Co. v. Jackson*, 89 Texas, 107; *DeHarn v. Railway Co.*, 86 Texas, 71; *Railway Co. v. McCormick*, 71 Texas, 660. If the Louisiana act of 1884 was penal, it would not be transitory and therefore not enforceable in the courts of other States. *Boston & Maine R. R. Co. v. Hurd*, 108 Fed. Rep. 116; *Higgins v. Central N. E. & W. Ry. Co.*, 155 Massachusetts, 176; *Nelson v. Chesapeake & Ohio Ry. Co.*, 88 Virginia, 971.

Article 2315 of the Civil Code of Louisiana, as amended by the act of 1884, created a right of action for injuries resulting in death and by its own language made it enforceable only for the period of one year from the death.

The transition from the case in plaintiffs' petition as fixed by its allegations alone, to the case made by a declaration upon the Louisiana statutory right of action in favor of the survivors mentioned for injuries resulting in death, as claimed to be the effect of the filing of the answers of defendants more than two years after the death, involved such a departure from law to law as to amount to the institution of a new and different cause of action. *Railway Co. v. Wyler*, 158 U. S. 285, 298; *Lumber Co. v. Water Works Co.*, 94 Texas, 456; *Whalen v. Gordon*, 95 Fed. Rep. 314; *Anderson v. Wetter*, 15 L. R. A. (N. S.) 1003; *Boston & Maine R. R. Co. v. Hurd*, 108 Fed. Rep. 116; 1 Ency. of Pl. & Pr., pp. 569, 570.

In this case the right of action in favor of the survivors under the Louisiana statute obtained for a period of one

year from the death and the right of action therefor lapsed and terminated without the commencement of an action upon it within that period, and could not thereafter exist as a right potential or enforceable anywhere. *Boyd v. Clark*, 8 Fed. Rep. 849; *Whalen v. Gordon*, 95 Fed. Rep. 319; *Theroux v. Railway Co.*, 64 Fed. Rep. 84; *Munos v. So. Pac. Co.*, 51 Fed. Rep. 188; *The Harrisburg*, 119 U. S. 199; *Davis v. Mills*, 194 U. S. 451, 457.

In fact there is no longer even a *prima facie* right of action as basis for recovery and the rule requiring the ordinary statute of limitation to be pleaded in order to avail as a defense is not called for and does not apply. 19 Am. & Eng. Ency. of Law, 2d ed., 150, 151; 13 Ency. of Pl. & Pr., 186, 187, and note 1; 25 Cyc. 1020, 1403.

The state courts having considered and adopted the Louisiana statute as the indispensable basis for the judgment and this solely through the medium of the defendant's pleading which was filed more than two years after the death, on the theory that such pleading when so filed became available as a declaration in behalf of the plaintiffs below, could not ignore the provision of that same act fixing and limiting the period of the right created without involving necessarily a refusal to give full faith and credit to the act. *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552; *Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 179-181; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 129.

Mr. J. W. Parker for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In that view of it which must be accepted here, this case may be stated as follows: It was an action to recover damages for the death of a locomotive engineer, resulting

221 U. S.

Opinion of the Court.

from the derailment of an engine which he was driving while in the service of two railroad companies which were jointly operating a line of railroad through the States of Louisiana and Texas. The derailment and ensuing death occurred in Louisiana, June 1, 1905, and proximately were caused by the negligence of the two companies. One of the companies was incorporated by a Louisiana statute of March 30, 1878, which contained a provision exempting the company from liability for the death of any person in its service, even if caused by its negligence. Laws of Louisiana, 1878, No. 21, § 17, p. 267. Another Louisiana statute, enacted July 10, 1884, and still in force, conferred upon designated relatives a right to recover the damages sustained by them through the death of a person negligently caused by another, but subjected the right to the limitation that the action to enforce it should be begun within one year from the death. Laws of Louisiana, 1884, No. 71, p. 94. Merrick's Revised Civil Code, Art. 2315. Within the time so prescribed the relatives so designated commenced in the District Court of Harris County, Texas, an action to recover from the two railroad companies the damages sustained by the engineer's death. The complaint, although stating all the facts essential to a recovery under the statute, was defective as a complaint in the Texas court, because it did not conform to the rule prevailing in that State that statutes of other States cannot be noticed judicially, but must be pleaded. More than a year after the death the defendants answered the complaint, and in their answers recognized the existence of the statute upon which the plaintiffs' action was founded, made allegations respecting it, and sought to enforce the one year limitation therein. At the trial the statutes of 1878 and 1884 were both duly proved, and upon all the evidence the finding and judgment were for the plaintiffs. The defendants appealed to the Court of Civil Appeals of the State, where the judgment was affirmed (128 S. W.

Rep. 1165), and then sued out this writ of error. In the trial court, and again in the Court of Civil Appeals, it was held (1) that the exempting provision in the statute of 1878 was repealed by the statute of 1884, and (2) that what appeared in the answers respecting the statute of 1884 cured the defect in the complaint and required that it be treated as an adequate and timely assertion of a right under that statute. In the assignments of error here these rulings are challenged upon the theory, which also was advanced in the state courts, that the exempting provision in the statute of 1878 was a contract and could not be repealed consistently with the contract clause of the Federal Constitution, and that, if that provision was validly repealed by the statute of 1884, the answers filed more than a year after the death could not be treated as curing the defect in the complaint without disregarding the one year limitation and thereby violating the full faith and credit clause of the Constitution.

The case is now before us on a motion to dismiss, with which is united a motion to affirm.

The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, *Id.* 659; *Stone v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488. In the first of these cases it was said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the

221 U. S.

Opinion of the Court.

protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in *Stone v. Mississippi*, *supra*, "It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain."

The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employes resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employes and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision and the contract clause of the Constitution did not prevent its repeal.

There is some discussion in the briefs as to whether the

provision was repealed by the statute of 1884, which was in apparent conflict with it, but upon this record that is not a Federal question. There was neither allegation nor proof that the court of last resort in Louisiana had considered the question or made any ruling upon it, and so it became the duty of the Texas courts, which do not take judicial notice of decisions of courts of other States, to decide the question according to their independent judgment. *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 52. This they did and, no Federal right being involved, their decision is not subject to review by this court. *Eastern Building and Loan Assn. v. Ebaugh*, 185 U. S. 114.

Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one year limitation and that the Texas courts could not disregard the qualification without impinging upon the full faith and credit clause of the Constitution, we think the claim that they did disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding they but gave effect to a generally recognized rule upon the subject. *United States v. Morris*, 10 Wheat. 246, 286. There was no shifting from one right of action to another, as in *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, and *United States v. Dalcour*, 203 U. S. 408, 423, but, on the contrary, an adherence to the right originally asserted. In these circumstances nothing more was involved than a question of pleading and practice in the Texas courts, and its decision by them is final.

Although regarding the question presented under the contract clause of the Constitution as sufficiently substantial to sustain our jurisdiction, we think it is so mani-

221 U. S.

Opinion of the Court.

fest that it was decided rightly by the Texas courts that the case ought not to be retained for further argument. See *Arrowsmith v. Harmoning*, 118 U. S. 194; *Richardson v. Louisville & Nashville R. R. Co.*, 169 U. S. 128; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 49.

The motion to dismiss is denied, and that to affirm is granted.

Affirmed.